RECORD AND BRIEFS

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Nos. 16-1436 and 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

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QUESTIONS PRESENTED

The Constitution and Acts of Congress confer on the President broad authority to prohibit or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. Exercising that authority, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). Section 2(c) of that Order suspends for 90 days the entry of certain foreign nationals of six countries that Congress or the Executive previously designated as presenting heightened terrorism-related risks, pending a review of screening and vetting procedures to assess what information is needed from foreign governments. Section 6(a) suspends for 120 days decisions on refugee applications and travel under the U.S. Refugee Admission Program for aliens from any country, pending a similar review of that program, and Section 6(b) reduces to 50,000 the maximum number of refugees who may be admitted in Fiscal Year 2017. The court of appeals in No. 16-1436 held that Section 2(c) likely violates the Establishment Clause and affirmed a preliminary injunction barring its enforcement against any person worldwide. The court of appeals in No. 16-1540 held that Sections 2(c), 6(a), and 6(b) likely exceed the President's authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and affirmed a preliminary injunction barring their enforcement against any person worldwide.

The questions presented are:

1. Whether respondents' challenges to Section 2(c)'s temporary entry suspension, Section 6(a)'s temporary refugee suspension, and Section 6(b)'s refugee cap are justiciable.

2. Whether respondents' challenges to Section 2(c) became moot on June 14, 2017.

3. Whether Sections 2(c), 6(a), and 6(b) exceed the President's statutory authority under the INA.

4. Whether Sections 2(c), 6(a), and 6(b) violate the Establishment Clause.

5. Whether the global injunctions are impermissibly overbroad.

PARTIES TO THE PROCEEDING

Petitioners (defendants-appellants below) in No. 16-1436 are Donald J. Trump, in his official capacity as President of the United States; the Department of Homeland Security; the Department of State; the Office of the Director of National Intelligence; Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security*; Rex W. Tillerson, in his official capacity as Secretary of State; and Daniel R. Coats, in his official capacity as Director of National Intelligence.

Respondents (plaintiffs-appellees below) in No. 16-1436 are the International Refugee Assistance Project, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, Inc., on behalf of itself and its clients; the Middle East Studies Association of North America, Inc., on behalf of itself and its members; Muhammed Meteab; Paul Harrison; Ibrahim Ahmed Mohomed; John Doe #1; Jane Doe #2; and John Doe #3.

Petitioners (defendants-appellants below) in No. 16-1540 are Donald J. Trump, in his official capacity as President of the United States; the Department of Homeland Security; the Department of State; Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security; Rex W. Tillerson, in his official capacity as Secretary of State; and the United States of America.

Respondents (plaintiffs-appellees below) in No. 16-1540 are the State of Hawaii and Dr. Ismail Elshikh.

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* Former Secretary of Homeland Security John F. Kelly was originally named as a defendant in both cases. Upon becoming the Acting Secretary of Homeland Security on July 31, 2017, Acting Secretary Elaine C. Duke was automatically substituted under this Court's Rule 35.3.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The amended opinion of the court of appeals in No. 16-1436 (J.A. 170-385) is reported at 857 F.3d 554. The opinion of the district court (J.A. 116-166) is not yet reported in the *Federal Supplement* but is available at 2017 WL 1018235. The order of the district court entering a preliminary injunction (J.A. 167-169) is not published.

The opinion of the court of appeals in No. 16-1540 (J.A. 1164-1237) is reported at 859 F.3d 741. The order of the district court entering a temporary restraining order (TRO) (J.A. 1102-1142) is not yet reported in the *Federal Supplement* but is available at 2017 WL 1011673. The order of the district court converting the TRO to a preliminary injunction (J.A. 1143-1163) is not yet reported in the *Federal Supplement* but is available at 2017 WL 1167383.

JURISDICTION

The amended judgment of the court of appeals in No. 16-1436 was entered on May 31, 2017. The petition for a writ of certiorari was filed on June 1, 2017, and the petition was granted on June 26, 2017.

The judgment of the court of appeals in No. 16-1540 was entered on June 12, 2017. The government's supplemental brief in support of its application for a stay was filed on June 15, 2017. On June 26, 2017, this Court construed the supplemental brief as a petition for a writ of certiorari and granted the petition on that date.

In both cases, the jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, at 1a-90a.

STATEMENT

The Constitution and Acts of Congress confer on the President broad authority to suspend or restrict the entry of aliens outside the United States when he deems it in the Nation's interest. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950);

8 U.S.C. 1182(f), 1185(a)(1). Exercising that authority, and after consulting with the Secretaries of State and Homeland Security and the Attorney General, the President placed a temporary 90-day pause (subject to individualized waivers) on the entry of certain foreign nationals of six countries that are sponsors or shelters of terrorism—and that Congress or the Executive previously had designated as presenting heightened terrorism-related risks—pending a worldwide review of screening and vetting procedures to assess what information is needed from foreign governments. The President also placed a 120-day pause on decisions and travel under the U.S. Refugee Admission Program (Refugee Program) pending a similar review, and limited the number of refugees who may enter the United States in Fiscal Year 2017 to 50,000.

The lower courts in these cases entered global preliminary injunctions barring enforcement of the President's actions. The district court in No. 16-1436 enjoined the six-country entry suspension, and the Fourth Circuit affirmed, concluding that it likely violates the Establishment Clause. J.A. 116-246. The district court in No. 16-1540 enjoined both the six-country entry suspension and the refugee-related provisions, and the Ninth Circuit affirmed in relevant part on the basis that those provisions likely exceed the President's statutory authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* J.A. 1143-1237. This Court granted the government's petitions for certiorari and also granted its stay applications with respect to foreign nationals who lack a credible claim of a bona fide relationship with persons or entities in the United States. *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2087-2089 (2017) (per curiam) (*IRAP*).

A. Legal Framework

"The exclusion of aliens is a fundamental act of sovereignty" that both is an aspect of the "legislative power" and also "is inherent in the executive power to control the foreign affairs of the nation." *Knauff*, 338 U.S. at 542; see *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-767 (1972). Congress has addressed entry into the United States in the INA, which vests the Executive with broad authority to suspend or restrict the entry of aliens abroad.

1. Under the INA, admission to the United States normally requires a valid visa or other valid travel document. See 8 U.S.C. 1181, 1182(a)(7)(A)(i) and (B)(i)(II), 1203. Applying for a visa typically requires an in-person interview and results in a decision by a Department of State consular officer. 8 U.S.C. 1201(a)(1), 1202(h), 1204; 22 C.F.R. 41.102, 42.62. Although a visa normally is necessary for admission, it does not guarantee admission; the alien still must be found admissible upon arriving at a port of entry. 8 U.S.C. 1201(h), 1225(a).

Congress has enabled nationals of certain countries to seek temporary admission without a visa under the Visa Waiver Program. 8 U.S.C. 1182(a)(7)(B)(iv); 8 U.S.C. 1187 (2012 & Supp. III 2015). In 2015, Congress excluded from travel under that Program aliens who are dual nationals of or recent visitors to Iraq or Syria, where "[t]he Islamic State of Iraq and the Levant (ISIL) * * * maintain[s] a formidable force," as well as dual nationals of and recent visitors to countries designated by the Secretary of State as state sponsors of terrorism (currently Iran, Sudan, and Syria).[1]

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[1] U.S. Dep't of State, *Country Reports on Terrorism 2015*, at 6, 299-302 (June 2016), https://goo.gl/40GmOS; see 8 U.S.C. 1187(a)(12)(A)(i) and (ii) (Supp. III 2015); J.A. 176 n.4.

Congress also has authorized the Department of Homeland Security (DHS) to designate additional countries of concern, considering whether a country is a "safe haven for terrorists," "whether a foreign terrorist organization has a significant presence" in the country, and "whether the presence of an alien in the country * * * increases the likelihood that the alien is a credible threat to" U.S. national security. 8 U.S.C. 1187(a)(12)(D)(i) and (ii) (Supp. III 2015). Applying those criteria, in February 2016, DHS excluded recent visitors to Libya, Somalia, and Yemen from travel under the Visa Waiver Program.[2]

2. Congress also has accorded the President broad discretion to suspend or restrict the entry of aliens. Section 1182(f) of Title 8 of the United States Code provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Section 1185(a)(1) of Title 8 further grants the President broad authority to adopt "reasonable rules, regulations, and orders" governing entry of aliens, "subject to such limitations and exceptions as [he] may prescribe."

3. The INA also establishes a procedure for setting the maximum number of refugees who may be admitted

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[2] DHS, *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), https://goo.gl/OXTqb5; J.A. 176 n.4.

each fiscal year. See 8 U.S.C. 1157. Section 1157 provides that "the number of refugees who may be admitted" in any fiscal year "shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation." 8 U.S.C. 1157(a)(2). The statute prescribes a process for "appropriate consultation" among Cabinet-level officials and Congress. 8 U.S.C. 1157(e). If an "unforeseen emergency refugee situation" arises mid-year, the President may (after appropriate consultation) set a higher maximum. 8 U.S.C. 1157(b).

B. The Executive Orders

1. The January Order

On January 27, 2017, the President issued Executive Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (January Order) (J.A. 1404-1415). The January Order directed the Secretary of Homeland Security, in consultation with other agencies, to assess current screening procedures to determine whether they are sufficient to detect individuals seeking to enter this country to do it harm. J.A. 1405-1406 (§ 3(a) and (b)). While that review was ongoing, the January Order suspended for 90 days entry of foreign nationals of the seven countries already designated as posing heightened terrorism-related concerns in the context of the Visa Waiver Program, subject to case-by-case exceptions. J.A. 1406 (§ 3(c) and (g)). Other provisions addressed the Refugee Program. J.A. 1409-1411 (§ 5); see 8 U.S.C. 1101(a)(42), 1157.

On February 3, 2017, a district court in Washington enjoined enforcement nationwide of the 90-day entry suspension and various refugee-related provisions. *Washington* v. *Trump*, No. 17-141, 2017 WL 462040 (W.D. Wash.). On February 9, 2017, a Ninth Circuit

panel declined to stay that injunction pending appeal, concluding that the January Order likely violated procedural due process. *Washington* v. *Trump*, 847 F.3d 1151, 1164-1167 (per curiam). The Ninth Circuit denied reconsideration en banc *sua sponte*, over the dissent of five judges who issued three separate opinions. *Washington* v. *Trump*, 858 F.3d 1168, 1171-1174 (2017) (Kozinski, J., dissenting); *id.* at 1174-1185 (Bybee, J., dissenting); *id.* at 1185-1188 (Bea, J., dissenting).

2. The Order

On March 6, 2017, responding to the Ninth Circuit panel's decision, the President issued Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Order), J.A. 1416-1440, with an effective date of March 16, 2017, J.A. 1439 (§ 14). The Order was adopted in accordance with a formal recommendation of the Secretary of Homeland Security and the Attorney General, who "urge[d]" the President to order a "thorough and fresh review of the particular risks to our Nation's security from our immigration system" and a "temporary pause on the entry of nationals from certain countries to allow this review to take place."[3] They expressed

> particular concerns about our current screening and vetting processes for nationals of certain countries that are either state sponsors of terrorism, or that have active conflict zones in which the central government has lost control of territory to terrorists or terrorist organizations, such as ISIS, core al-Qa'ida, and their regional affiliates.[4]

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[3] See Letter from Jefferson B. Sessions III, Att'y Gen., & John Francis Kelly, Sec'y of Homeland Sec., to President Donald J. Trump 1-2 (Mar. 6, 2017), https://goo.gl/H69g8I (March 6 Letter).

[4] *Id.* at 2.

The Order revoked the January Order, J.A. 1439 (§ 13), replacing it with significantly revised provisions. At issue here are Sections 2(c), 6(a), and 6(b).

a. Section 2 directs the Secretary of Homeland Security, in consultation with the Secretary of State and Director of National Intelligence, to conduct a worldwide review of screening and vetting procedures to determine whether and what additional information may be needed from foreign countries to assess whether their nationals seeking entry pose a security threat. J.A. 1425 (§ 2(a)). The Order directs the agencies to report their findings to the President within 20 days and instructs the Secretary of State to request that each foreign government supply the needed information within 50 days thereafter. J.A. 1425-1426 (§ 2(b) and (d)). The agencies are then to recommend to the President "prohibit[ions on] the entry of appropriate categories of foreign nationals of countries that have not provided the information requested," have not adopted an "adequate plan to do so," and have not "adequately shared information through other means." J.A. 1427 (§ 2(e)).

During this worldwide review, Section 2(c) places a temporary, 90-day pause on entry of certain nationals of six countries that Congress or the Executive had previously identified as presenting heightened terrorism-related concerns: Iran, Libya, Somalia, Sudan, Syria, and Yemen. J.A. 1426. The Order explains that each of the six countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," which is why Congress or the Executive previously designated them. J.A. 1419-1420 (§ 1(d)); see J.A. 1416-1417 (§ 1(b)(i)). The Order further details the circumstances of each country that give rise to

"heightened risks" of terrorism and diminish their governments' "willingness or ability to share or validate important information about individuals" needed to screen their nationals. J.A. 1419-1422 (§ 1(d) and (e)).[5]

"[I]n light of the[se] national security concerns," and invoking his authority under 8 U.S.C. 1182(f) and 1185(a), the President determined "that the unrestricted entry into the United States" of those six countries' nationals during the 90 days "would be detrimental to the interests of the United States." J.A. 1426 (§ 2(c)). The President also adopted the suspension "[t]o temporarily reduce investigative burdens on relevant agencies during the review period," "to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals," and "to ensure that adequate standards are established to prevent infiltration by foreign terrorists." *Ibid.*[6]

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[5] See March 6 Letter 2. Although the January Order's suspension had included Iraq, the Order omits Iraq from the suspension because of "the close cooperative relationship between" the U.S. and Iraqi governments, and because, since the January Order, "the Iraqi government has expressly undertaken steps" to supply information necessary to help identify possible threats. J.A. 1423-1424 (§ 1(g)); see J.A. 1431 (§ 4).

[6] Addressing concerns courts had raised regarding the January Order, the Order clarifies that the suspension applies only to aliens who (1) were outside the United States on the Order's effective date, (2) did not have a valid visa on that date, and (3) did not have a valid visa on the effective date of the January Order. J.A. 1428 (§ 3(a)). It also expressly excludes other categories of aliens that had concerned courts addressing the January Order, such as lawful permanent residents. J.A. 1428-1429 (§ 3(b)).

The Order includes a detailed provision permitting case-by-case waivers from Section 2(c)'s entry suspension when denying entry "would cause undue hardship" and "entry would not pose a threat to national security and would be in the national interest." J.A. 1429 (§ 3(c)). It provides a nonexhaustive list of circumstances in which a waiver could be appropriate, including when the applicant seeks entry "to visit or reside with a close family member (*e.g.*, a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa." J.A. 1430 (§ 3(c)(iv)). Waivers can be requested, and are decided by a consular officer, "as part of the visa issuance process," or by the Commissioner of U.S. Customs and Border Protection (or his delegee). J.A. 1429 (§ 3(c)).[7]

b. Section 6 of the Order addresses refugees. Section 6(a) directs the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, to conduct a review of the Refugee Program and "determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States." J.A. 1433. Pending that review, Section 6(a) suspends decisions on applications under the Refugee Program and travel of refugees for 120 days. *Ibid.* The suspension does not apply to refugee applicants who were formally scheduled for transit to the United States before the Order's effective date. *Ibid.*

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[7] See Bureau of Consular Affairs, U.S. Dep't of State, *Executive Order on Visas* (Mar. 22, 2017), https://goo.gl/HoNiNz; DHS, *Q&A: Protecting the Nation from Foreign Terrorist Entry to the United States* (Mar. 6, 2017), https://goo.gl/WtVwTu.

Section 6(b) of the Order limits to 50,000 the number of refugees who may be admitted in Fiscal Year 2017, based on the President's determination under 8 U.S.C. 1182(f) that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." J.A. 1434. Section 6(b) accordingly "suspend[s] any entries in excess of that number until such time as [the President] determine[s] that additional entries would be in the national interest." *Ibid.* Section 6(c) provides for case-by-case waivers. *Ibid.*

C. Procedural History

1. The IRAP *litigation (No. 16-1436)*

a. Respondents in *IRAP* are six individuals and three organizations that challenged (as relevant here) Section 2(c) of the Order under the INA and the Establishment Clause. J.A. 127-128. The individual *IRAP* respondents are U.S. citizens or lawful permanent residents who claimed that the Order would prevent or delay a foreign-national family member from entering the United States. Four individuals—John Doe #1, Jane Doe #2, John Doe #3, and Paul Harrison—alleged that Section 2(c) would prevent family members from obtaining visas. J.A. 54-55, 95-100, 102-103. The other two—Muhammed Meteab and Ibrahim Ahmed Mohomed—alleged that family members would be denied or delayed admission under the Refugee Program. J.A. 55-56, 100-101, 103-104.

One organization, the Middle East Studies Association of North America, Inc. (MESA), alleged that Section 2(c) would prevent its members abroad from traveling to the United States for conferences, deter U.S. members from conducting work abroad, and prevent foreign scholars from attending MESA's annual meeting in the

United States. J.A. 53-54, 92-95. The other two—the International Refugee Assistance Project (IRAP) and HIAS, Inc.—principally provide services to refugees and asserted injury based on the refugee provisions. J.A. 49-53, 82-92.

b. After expedited briefing and argument, the district court enjoined Section 2(c). J.A. 116-166. It held that three individual respondents (Does #1, #2, and #3) had standing to challenge Section 2(c) on statutory grounds. J.A. 129-134. The court held, however, that respondents were likely to succeed only in part on their statutory challenge, which could not support enjoining Section 2(c) in its entirety. J.A. 138-145. The court therefore proceeded to address respondents' constitutional challenge.

The district court held that three respondents (Doe #1, Doe #3, and Meteab) had standing to assert an Establishment Clause claim and were likely to succeed on the merits. J.A. 134-137, 145-161. It declined to consider whether Section 2(c)'s express national-security basis is a "facially legitimate and bona fide reason" under *Mandel*, 408 U.S. at 770. J.A. 159-160. Instead, it evaluated respondents' claim under *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). J.A. 145-146. While acknowledging that the Order "is facially neutral in terms of religion," the court held—based primarily on campaign statements made by then-candidate Donald Trump and subsequent statements by the President's aides—that the Order was adopted for an improper "religious purpose" of preventing Muslim immigration. J.A. 153; see J.A. 147-153. The court entered a global preliminary injunction barring any enforcement of Section 2(c) and denied a stay. J.A. 167-169.

c. The government appealed and sought a stay. The court of appeals *sua sponte* ordered initial hearing en banc, and in a divided decision largely affirmed the injunction and denied a stay. J.A. 170-385.

i. The majority held that one respondent, Doe #1, had standing to assert an Establishment Clause claim based on the anticipated application of Section 2(c) to his wife (an Iranian national) combined with his allegation that Section 2(c) sends a "state-sanctioned message condemning his religion." J.A. 196. On the merits, the court reasoned that, although the Order's "stated national security interest is, on its face, a valid reason for Section 2(c)'s suspension of entry," J.A. 214, *Mandel* provides only "the starting point for [the] analysis," J.A. 208. Because the majority concluded that Doe #1 had made "an affirmative showing of bad faith," it "look[ed] behind" the government's "facially legitimate justification." J.A. 212-213 (citation and internal quotation marks omitted); see J.A. 215-217. Relying primarily on statements made by then-candidate Trump in 2015 and 2016, the majority concluded that the Order was "motivated" by a "desire to exclude Muslims from the United States." J.A. 222; see J.A. 219-223.

Although the majority held only that Doe #1 could assert an Establishment Clause claim, it affirmed the global injunction except as against the "President himself." J.A. 244; see J.A. 236-245. The majority held that the violation of respondents' Establishment Clause rights itself "constitutes irreparable injury" and is not outweighed by harm to the government and public interest. J.A. 237 (citation omitted); see J.A. 236-243. The majority further held that nationwide relief was appropriate because respondents "are dispersed throughout the United States," the immigration laws "should be

enforced vigorously and uniformly," and "enjoining [Section 2(c)] only as to [respondents] would not cure the constitutional deficiency." J.A. 244 (citation and emphasis omitted).

ii. Four judges filed concurring opinions. J.A. 247-320. Judge Traxler concurred in the judgment. J.A. 247. Judges Keenan, Thacker, and Wynn, each writing separately, agreed to varying degrees with the majority's constitutional analysis and opined that the Order also likely violated various provisions of the INA. J.A. 248-320.

iii. Judges Agee, Niemeyer, and Shedd filed dissents, with each judge joining each dissent. J.A. 321-385. Judge Agee opined that respondents' Establishment Clause claim is not justiciable. J.A. 368-385. "[T]he imagined future denial of a visa to [Doe #1's] wife is simply too vague and speculative" to confer standing, he concluded, and Doe #1's alleged "stigma" from the Order "is not a cognizable injury" but "simply a subjective disagreement with a government action." J.A. 374-375. Judge Niemeyer opined that the majority's Establishment Clause analysis "plainly violates" *Mandel*, and its "extratextual search for evidence suggesting bad faith" both "radically extends" this Court's precedents and "has no rational limit." J.A. 332, 341, 346. Judge Shedd opined that the district court "totally failed to respect" the deference due to the Executive's national-security judgments, and the "shortcomings" in its "selectively negative interpretation of political campaign statements" are "obvious." J.A. 358-359.

d. On June 1, 2017, the government sought certiorari and a stay from this Court. On June 24, 2017, the *IRAP* respondents informed the Court that Doe #1's wife had received an immigrant visa. *IRAP*, 137 S. Ct. at 2086 n.*.

2. The Hawaii *litigation (No. 16-1540)*

a. Respondents in *Hawaii* are the State of Hawaii and Dr. Ismail Elshikh. J.A. 1102-1103. The *Hawaii* respondents claimed that Sections 2 and 6 of the Order violate the INA and the Due Process and Establishment Clauses. J.A. 1040-1047. Hawaii alleged that the Order would adversely affect students and faculty at its state-run educational institutions, reduce tourism, and hinder its efforts to assist in resettling refugees. J.A. 1005-1009. Dr. Elshikh is a Muslim U.S. citizen who lives in Hawaii with his wife and children (who are also U.S. citizens). J.A. 1009. He claimed that his Syrian mother-in-law lacked a visa to enter the country and thus would be delayed in joining him and his family in Hawaii. *Ibid.*

b. After expedited briefing and argument, the district court entered a global TRO barring enforcement of Sections 2 and 6 in their entirety—including provisions requiring internal review of the government's screening and vetting procedures. J.A. 1102-1142. It held that Hawaii and Dr. Elshikh had standing to challenge those provisions under the Establishment Clause. J.A. 1117-1125. On the merits, the court acknowledged that the Order "does not facially discriminate for or against any particular religion," but it held—based primarily on campaign statements made by then-candidate Trump and subsequent statements by his aides—that "religious animus dr[ove] the promulgation of the [Order]." J.A. 1129, 1132.

In subsequently converting the TRO to a preliminary injunction based on the same considerations, the district court declined to evaluate the Order under *Mandel*. J.A. 1155-1157. The court also declined to

limit the injunction to Section 2(c)'s temporary suspension on entry for nationals of six countries and declined to stay the injunction pending appeal. J.A. 1160-1163.

c. The court of appeals heard argument on May 15, 2017. Because the court had not ruled when the government sought certiorari in *IRAP*, the government also requested a stay of the *Hawaii* district court's injunction from this Court pending disposition of the appeal. *IRAP*, 137 S. Ct. at 2085.

Before this Court ruled on that stay request, the court of appeals affirmed the injunction in part and vacated it in part. The court expressly declined to reach respondents' Establishment Clause challenge, J.A. 1178, instead resting its decision on statutory grounds, J.A. 1178-1223. It held that Dr. Elshikh and Hawaii had standing to challenge Sections 2 and 6, their claims are ripe and fall within the zone of interests protected by the statute, and their claims are not barred by consular nonreviewability. J.A. 1178-1193.

On the merits, the court of appeals primarily held that Section 2(c)'s 90-day suspension of entry, Section 6(a)'s 120-day suspension of decisions and travel under the Refugee Program, and Section 6(b)'s refugee cap exceed the President's authority under 8 U.S.C. 1182(f). J.A. 1194-1209. The court acknowledged the President's power under Section 1182(f) to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants" "[w]henever the President finds that" such entry "would be detrimental to the interests of the United States." J.A. 1195 (quoting 8 U.S.C. 1182(f)). But it held that "[t]here is no sufficient finding in [the Order] that the entry of the excluded classes would be detrimental to the interests of the United States." J.A. 1197.

The court of appeals also held that Section 2(c) violates 8 U.S.C. 1152(a)(1)(A), which bars "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa" on various bases, including an alien's "nationality." J.A. 1209-1210 (citation omitted). The court held that, although Section 1152(a)(1)(A) addresses only issuance of visas, it also "cabins the President's authority under [Section] 1182(f)" to restrict entry of aliens. J.A. 1213; see J.A. 1209-1216. And although Section 1152(a)(1)(A) does not address nonimmigrant visas, the court declined to limit the injunction to immigrant visas. J.A. 1233 n.24.

The court of appeals further held that Section 6(b)'s lowering of the refugee cap for Fiscal Year 2017 to 50,000 violates 8 U.S.C. 1157. J.A. 1216-1221. Section 1157 authorizes the President, in consultation with congressional leadership, to establish at the start of each fiscal year the maximum number of refugees who may be admitted. The court held that the President could not subsequently direct that a lower number be permitted to enter. *Ibid.*

The court of appeals held that respondents are likely to suffer irreparable harm that is not outweighed by the injury to the government, and that the public interest supports an injunction. J.A. 1223-1229. It further declined to limit the injunction to respondents. J.A. 1233-1235. The court held, however, that the district court abused its discretion in enjoining the "internal review procedures" of Sections 2 and 6 and in enjoining the President himself. J.A. 1230-1231. The court denied the government's request for a stay. J.A. 1237 n.25.

d. This Court directed the parties to submit supplemental briefs addressing the court of appeals' decision. The government requested that the Court construe its

stay application as a petition for a writ of certiorari and grant the petition. 16-1540 Gov't Cert. Supp. Br. 2, 30.

3. This Court's June 26 ruling

On June 26, 2017, this Court granted certiorari in both cases and consolidated them for argument. *IRAP*, 137 S. Ct. at 2086. The Court also directed the parties to address "[w]hether the challenges to [Section] 2(c) became moot on June 14, 2017," *id.* at 2087, *i.e.*, 90 days after the Order was initially intended to take effect. The Court further granted a partial stay of both injunctions. *Id.* at 2087-2089. With respect to Section 2(c), the Court stated:

> The injunctions remain in place only with respect to parties similarly situated to [Doe #1], Dr. Elshikh, and Hawaii. In practical terms, this means that [Section] 2(c) may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States. All other foreign nationals are subject to the provisions of [the Order].

Id. at 2088. The Court granted a similar partial stay as to Section 6(a) and (b): those provisions "may not be enforced against an individual seeking admission as a refugee who can credibly claim a bona fide relationship with a person or entity in the United States," but "[a]s applied to all other individuals, the provisions may take effect." *Id.* at 2089.

Justice Thomas, joined by Justices Alito and Gorsuch, concurred in part and dissented in part and would have stayed the injunctions in full. *IRAP*, 137 S. Ct. at 2089-2090.

4. The Hawaii *district court's modification of its injunction*

In light of this Court's June 26, 2017, stay ruling, the Departments of State and Homeland Security began implementing the previously enjoined provisions. *Hawaii* D. Ct. Doc. 301, at 6 (July 3, 2017). The *Hawaii* respondents challenged the agencies' interpretation of the scope of this Court's stay in several respects, and the *Hawaii* district court ultimately modified its preliminary injunction in two relevant ways. First, it held that every refugee as to whom the Department of State has obtained an assurance agreement from a resettlement agency has a qualifying bona fide relationship with a U.S. entity, and therefore is exempt from Section 6(a) and (b) of the Order. J.A. 1263-1265. Second, the court held that the government's interpretation of "close familial relationship" was too narrow. J.A. 1249; see J.A. 1258-1263. This Court stayed the district court's modification with respect to refugees covered by a formal assurance pending resolution of the government's appeal of that ruling to the Ninth Circuit. 16-1540 Order (July 19, 2017).

SUMMARY OF ARGUMENT

The courts of appeals nullified a formal national-security directive of the President of the United States acting at the height of his power. That conclusion cannot be squared with established rules of judicial review, statutory and constitutional interpretation, and equitable relief. Especially in cases like this one that spark such passionate public debate, it is all the more critical that courts faithfully adhere to those fundamental rules, which transcend this debate, this Order, and this constitutional moment.

I. Respondents' challenges to the Order are foreclosed by the general rule that federal courts may not second-guess the political branches' decisions to exclude aliens abroad. The Court has permitted limited review only where a U.S. citizen contends that exclusion of an alien violates the citizen's own constitutional rights. That principle forecloses review of respondents' statutory challenges. And respondents do not assert a cognizable violation of their own rights under the Establishment Clause. Doe #1's and Dr. Elshikh's claimed injuries based on delay in entry of family members never stemmed from any violation of their own rights, and in any event those claimed injuries are now moot. Their claimed injuries based the Order's purportedly stigmatizing message also are not cognizable under this Court's precedent. Hawaii has no Establishment Clause rights and no sovereign interest in entry of aliens abroad.

II. The challenges to Section 2(c)'s 90-day entry suspension did not become moot on June 14, 2017. Background legal principles and common sense preclude construing the suspension to end before it was allowed to begin. A memorandum issued by the President on June 14 eliminates any uncertainty. If the challenges are moot, however, the injunctions as to Section 2(c) should be vacated.

III. The Order does not violate the INA. Congress expressly authorized the President to "suspend the entry of all aliens or any class of aliens" whose entry he "finds" would be "detrimental" to the Nation's interests, 8 U.S.C. 1182(f), and to "prescribe" "limitations and exceptions" on entry, 8 U.S.C. 1185(a)(1). Sections 2(c)'s entry suspension, Section 6(b)'s refugee suspension, and Section 6(b)'s refugee cap fall comfortably

within that expansive authority and rest on the President's express findings that those measures are warranted to safeguard the Nation. The Ninth Circuit erred in construing the INA to require more.

Section 2(c)'s entry suspension does not violate 8 U.S.C. 1152(a)(1)(A)'s bar on nationality-based discrimination or preferences in the issuance of immigrant visas. Section 1152(a)(1)(A) does not compel issuance of visas to aliens who are independently ineligible to receive them. Nor does Section 2(c) conflict with 8 U.S.C. 1182(a)(3)(B), which renders inadmissible aliens with certain links to terrorist activity or groups. Nothing prevents the President from suspending entry of aliens under Section 1182(f) for reasons related to one of the inadmissibility grounds in Section 1182(a). And Section 6(b)'s refugee cap does not violate 8 U.S.C. 1157, which establishes a procedure for setting the maximum number of refugees who may be admitted each year, but does not set a minimum number who must be admitted.

IV. Respondents' Establishment Clause challenge is governed by, and fails under, *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), which requires upholding the Executive's decision to exclude aliens abroad so long as it rests on a "facially legitimate and bona fide reason." *Id.* at 770. Sections 2(c), 6(a), and 6(b) of the Order rest squarely on a national-security determination by the President that is legitimate on its face and supported by extensive factual findings. *Mandel* therefore precludes "look[ing] behind" the President's rationale. *Ibid.* The Fourth Circuit's holding that courts "*may* 'look behind'" the Executive's stated reason to determine if it was given in bad faith, J.A. 212 (emphasis added; citation omitted), is flatly inconsistent with *Mandel*.

The Order's challenged provisions are valid even under the domestic Establishment Clause case law on which the Fourth Circuit relied. The Order's text and operation are entirely religion-neutral. The Fourth Circuit erred by discounting those objective indicia of the Order's purpose based largely on campaign statements made by then-candidate Trump before taking office. This Court's precedent prohibits such "judicial psychoanalysis of a drafter's heart of hearts." *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005). The Fourth Circuit's approach is also standardless and unworkable, and it threatens to chill campaign speech and interfere with the President's conduct of foreign affairs. Without the campaign statements, the Fourth Circuit's ruling invalidating the Order is unsupportable. But even if those statements are considered, they cannot overcome the objective indicia of the Order's express national-security purpose.

V. Both courts of appeals compounded their errors by affirming global injunctions that are vastly overbroad. Article III and principles of equity require that injunctive relief be no broader than necessary to redress irreparable injuries to the parties before the court. Even if respondents had shown any irreparable, cognizable injury, relief limited to enjoining application of the Order to the specific aliens whose entry respondents seek would have fully redressed those harms.

ARGUMENT

I. RESPONDENTS' CHALLENGES TO THE ORDER ARE NOT JUSTICIABLE

It is a fundamental separation-of-powers principle, long recognized by Congress and this Court, that the political branches' decisions to exclude aliens abroad generally are not judicially reviewable. That firmly

established principle bars any review of respondents' statutory claims. This Court has permitted limited review only when a U.S. citizen asserts a cognizable claim that exclusion of an alien abroad infringes the citizen's own constitutional rights. Although respondents have invoked the Establishment Clause, they assert no cognizable violation of their *own* rights under that Clause.

A. The Denial Of Entry To An Alien Abroad Is Reviewable Only For A Violation Of A U.S. Citizen's Own Constitutional Rights

1. "The exclusion of aliens is a fundamental act of sovereignty" that the Constitution entrusts to the political branches. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950). "The right to" exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Ibid.* This Court accordingly "ha[s] long recognized the power to * * * exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

As Justice Jackson explained for the Court in *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952), "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Id.* at 588-589. "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Id.* at 589. The Court has since made clear that "[t]he conditions of entry

for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based" are "wholly outside the power of this Court to control." *Fiallo*, 430 U.S. at 796 (citation omitted).

Of course, Congress generally "may, if it sees fit, * * * authorize the courts to" review decisions to exclude aliens. *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 660 (1892). Absent such affirmative authorization, however, judicial review of exclusion of aliens outside the United States is ordinarily unavailable. "Whatever the rule may be concerning deportation of persons who have gained entry into the United States," this Court has explained, "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543; see *id.* at 542-547 (holding that the Attorney General's decision to exclude the alien wife of a U.S. citizen "for security reasons" was "final and conclusive"). Aliens detained at a port of entry traditionally could obtain limited review through habeas corpus, see *Nishimura Ekiu*, 142 U.S. at 660, but that avenue for judicial review obviously is unavailable for aliens abroad, who are not in custody.

Courts have applied the fundamental and longstanding principle of nonreviewability to conclude that the denial or revocation of a visa for an alien abroad "is not subject to judicial review * * * unless Congress says otherwise." *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Courts have referred to that principle as "the doctrine of consular nonreviewability,"

ibid., but the shorthand label merely reflects the context in which the principle most often arises—*i.e.*, challenges to decisions by consular officers adjudicating visa applications. The principle underlying that doctrine applies regardless of the manner in which the Executive decides to deny entry to an alien abroad.

2. Congress has declined to provide for judicial review of decisions to exclude aliens abroad. It has not authorized any judicial review of visa denials—even by the alien affected, much less by third parties like respondents here. *E.g.*, 6 U.S.C. 236(f) ("Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa."); see 6 U.S.C. 236(b)(1) and (c)(1). Congress also has expressly forbidden "judicial review" of visa revocations (subject to a narrow exception for aliens in removal proceedings where the only ground of revocation is removal, an exception inapplicable to aliens abroad). 8 U.S.C. 1201(i).

Indeed, when this Court held that aliens physically present in the United States—but not aliens abroad—could seek review of their exclusion orders under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, see *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184-186 (1956), Congress intervened to foreclose such review. Congress expressly precluded APA suits challenging exclusion orders and permitted review only through habeas corpus—a remedy that is unavailable to an alien seeking entry from abroad. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651-653 (codified at

8 U.S.C. 1105a(b) (1994)).[8] In short, Congress maintained the bar to judicial review of the denial of entry to aliens abroad. See *Saavedra Bruno*, 197 F.3d at 1157-1162 (recounting history).[9]

3. Although Congress has not authorized judicial review of Executive decisions to exclude aliens abroad, it has not "clear[ly]" "preclude[d] judicial review of constitutional claims" by persons asserting violations of their own constitutional rights. *Webster* v. *Doe*, 486 U.S. 592, 603 (1987). The exclusion of aliens abroad typically raises no constitutional questions because aliens abroad lack any constitutional rights regarding entry. "[A]n alien who seeks admission to this country may not do so under any claim of right"; instead, "[a]dmission of aliens to the United States is a privilege granted by the sovereign United States Government," and "only upon such terms as the United States shall prescribe." *Knauff*, 338 U.S. at 542; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972).

This Court, however, has twice engaged in limited judicial review when a U.S. citizen contended that the denial of a visa to an alien abroad violated the citizen's *own* constitutional rights. In *Mandel*, the Court reviewed

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[8] Congress subsequently replaced 8 U.S.C. 1105a (1994) with 8 U.S.C. 1252, which similarly curtails review (of what are now termed removal orders) outside a specific process established by statute.

[9] Although Congress has created in the APA "a general cause of action" for "persons 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,'" *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 345 (1984) (citation omitted), that cause of action does not permit review of matters like the exclusion of aliens abroad because the APA does not displace the general rule barring review of decisions to exclude aliens abroad. See *Saavedra Bruno*, 197 F.3d at 1157-1162; see also 5 U.S.C. 701(a), 702(1).

a claim that the denial of a waiver of visa-ineligibility to a Belgian national who wished to speak on communism violated U.S. citizens' own First Amendment right to receive information. 408 U.S. at 756-759, 762-770. As the Court explained, the alien himself could not seek review because he "had no constitutional right of entry to this country." *Id.* at 762. The Court addressed (and rejected on the merits) only the claim of U.S. citizens that the alien's exclusion violated their own constitutional rights. *Id.* at 770. And in *Kerry* v. *Din*, the Court considered but denied a claim by a U.S. citizen that the exclusion of her husband violated her own due-process rights. 135 S. Ct. 2128, 2131 (2015) (opinion of Scalia, J.); *id.* at 2139 (Kennedy, J., concurring in the judgment) (assuming without deciding that U.S. citizen had protected liberty interest in husband's visa application). Limited review was available in each case only because the plaintiffs asserted violations of their own constitutional rights as U.S. citizens.

B. Respondents Cannot Assert Any Establishment Clause Rights Of Their Own In Challenging The Order

The longstanding rule barring judicial review of the political branches' exclusion of aliens abroad plainly forecloses respondents' statutory challenges to the Order. The Ninth Circuit seriously departed from that foundational rule by second-guessing and enjoining the President's exercise of the authority expressly conferred on him by Congress to suspend the entry of aliens. Although respondents also invoke the Establishment Clause, they have not asserted violations of their own rights. The courts of appeals held that two individual respondents (Doe #1 in *IRAP* and Dr. Elshikh in *Hawaii*) have standing to challenge the Order because Section 2(c) would delay entry of a family member. But

those alleged injuries never stemmed from a violation of Doe #1's or Dr. Elshikh's *own* constitutional rights. In any event, those claimed injuries are now moot because Doe #1's wife and Dr. Elshikh's mother-in-law have received visas. The Fourth Circuit and the *Hawaii* district court also held that the individual respondents were injured because the Order sends a message that condemns their Islamic faith. That reasoning is irreconcilable with this Court's precedent and would eviscerate settled rules of justiciability. Finally, the Ninth Circuit held that Hawaii is injured by the Order, but Hawaii has no Establishment Clause rights and cannot assert any rights of its residents.[10]

1. Doe #1's and Dr. Elshikh's delay-in-entry injuries are not cognizable

The Fourth Circuit held that Doe #1 was injured by Section 2(c) because it would delay "his wife's entry into

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[10] The Fourth Circuit correctly did not hold that any other respondent in *IRAP* has a live, cognizable Article III injury from Section 2(c), the only provision enjoined in that case. Harrison's fiancé and Doe #3's wife were issued visas and so are not affected by the Order. *IRAP* Gov't C.A. Br. 19 n.6; *IRAP* Resps. C.A. Supp. App. 819. Jane Doe #2 is petitioning for her sister, but there is a multi-year backlog for immigrant-visa numbers for U.S. citizens' siblings. *IRAP* Gov't C.A. Br. 19 & n.7. The remaining individual plaintiffs, along with organizational plaintiffs IRAP and HIAS, seek admission for refugees, J.A. 184-186—a process not affected by Section 2(c). And the remaining organizational plaintiff, MESA, asserts standing based on a member's alleged inability to attend a meeting in November 2017, after the 90-day suspension was originally scheduled to end. See pp. 7-8, 11-12, *supra*; *IRAP* Gov't C.A. Br. 25. None of the organizations identified a member or client whom Section 2(c) would bar from entering.

the United States" and thereby "prolong their separation." J.A. 196. The Ninth Circuit reached the same conclusion as to Dr. Elshikh and his mother-in-law. J.A. 1181-1182.

a. The claimed injuries to Doe #1 and Dr. Elshikh were never cognizable because they did not stem from any alleged infringement of their *own* religious freedoms. In *McGowan* v. *Maryland*, 366 U.S. 420 (1961), this Court held that individuals who are indirectly injured by alleged religious discrimination against others generally may not sue, because they have not suffered violations of their own rights under the Free Exercise Clause or the Establishment Clause. *Id.* at 429-430. The Court concluded in *McGowan* that the plaintiffs, employees of a store subject to a State's Sunday-closing law, lacked standing to challenge that law on free-exercise grounds because they "d[id] not allege any infringement of their own religious freedoms." *Id.* at 429; see *Smith* v. *Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 207 (6th Cir. 2011) (en banc), cert. denied, 565 U.S. 820 (2011).[11] Similarly, in *Elk Grove Unified School District* v. *Newdow*, 542 U.S. 1 (2004), the Court held that a non-custodial parent could not challenge recitation of the Pledge of Allegiance at his daughter's school because his "standing

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[11] *McGowan* held that the plaintiffs could assert an Establishment Clause challenge to the state law at issue only because they suffered "direct * * * injury, allegedly due to the imposition on them of the tenets of the Christian religion": they were subjected to (indeed, prosecuted under) a Sunday-closing law, which regulated their own conduct. See 366 U.S. at 430-431; see also *id.* at 422. By contrast, indirect injury from alleged discrimination against others is not a violation of one's own Establishment Clause rights under *McGowan*, and therefore it does not provide a basis for challenging the exclusion of an alien abroad under *Mandel* and *Din*.

derive[d] entirely from his relationship with his daughter," not from a violation of his own rights. *Id.* at 15-18 & n.8. Likewise here, in challenging the application of Section 2(c) to family members, U.S. citizens like Doe #1 and Dr. Elshikh are not asserting violations of their own constitutional rights. They are instead seeking to vindicate the interests of third parties whose entry is suspended. They therefore cannot seek the limited review afforded in *Mandel* and *Din*.

b. Even if these injuries were once cognizable, they are now moot. "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citation omitted). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). Here, Doe #1's wife and Dr. Elshikh's mother-in-law have now received visas. *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2086 n.* (2017) (per curiam) (*IRAP*); 16-1540 Resps. Letter (July 20, 2017). Regardless of whether Doe #1's and Dr. Elshikh's claimed family-member injuries were ever justiciable, those injuries do not confer "a legally cognizable interest in the outcome" today. *Already*, 568 U.S. at 91 (citation omitted).[12]

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[12] If this Court agrees and further finds that none of respondents' other asserted injuries and claims is justiciable, it should "vacate the judgment[s] below and remand with a direction to dismiss" under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see pp. 37-38, *infra*.

2. *Doe #1's and Dr. Elshikh's "message" injuries are not cognizable*

The Fourth Circuit held that Section 2(c) also injured Doe #1 by sending a "message" that condemns Islam, J.A. 199, 202, and the district court in *Hawaii* reached the same conclusion as to Dr. Elshikh. J.A. 1123-1125, 1151-1152. Even the Fourth Circuit, however, did not hold that purported "message" injury sufficient by itself to make a claim justiciable. J.A. 202-203 n.11 (holding Doe #1's claim justiciable based on the combination of that purported message and the effect of Section 2(c) on his wife). And for good reason: respondents' asserted "message" injury is not cognizable because it likewise does not result from a violation of respondents' own constitutional rights.

a. This Court has "ma[de] clear" that "the stigmatizing injury often caused by racial [or other invidious] discrimination * * * accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (citation omitted). The Court has applied that same rule to Establishment Clause claims: "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not the type of "personal injury" that supports standing to sue, "even though the disagreement is phrased in [Establishment Clause] terms." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982); *id.* at 486 ("[S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy.").

To be sure, a plaintiff may suffer a "spiritual" injury from the violation of his own Establishment Clause rights

where he himself has been "subjected to unwelcome religious exercises" or "forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 486-487 n.22. But neither of those exists here. First, Section 2(c) does not expose Doe #1 or Dr. Elshikh to a religious message: it says nothing about religion, and does not subject them to any religious exercise. *A fortiori*, Section 6(a) and (b) cannot impose any such injury, because they apply to refugees from every country worldwide. Second, all three provisions apply only to aliens abroad and are not targeted at respondents. The Fourth Circuit tried to sidestep this problem by asserting that, in addressing justiciability, it had to "assume the merits" of Doe #1's argument that Section 2(c) "sends a sufficiently religious message such that it violates the Establishment Clause." J.A. 200 n.9. But *Valley Forge*'s rule required the court to determine whether (not merely assume that) a religious message was directed to respondents in a way that causes them cognizable injury.

b. The D.C. Circuit correctly has rejected the notion that a putative Establishment Clause plaintiff may "re-characterize[]" an abstract injury flowing from "government *action*" directed against others as a personal injury from "a governmental *message* [concerning] religion" directed at the plaintiff. *In re Navy Chaplaincy*, 534 F.3d 756, 764 (2008) (Kavanaugh, J.), cert. denied, 556 U.S. 1167 (2009). If that were permissible, the D.C. Circuit explained, it would "eviscerate well-settled standing limitations." *Ibid.* The challengers in *Valley Forge* and other cases "could have obtained standing to sue simply by targeting not the government's action, but rather the government's alleged 'message' of religious preference communicated through that action." *Ibid.*

The Fourth Circuit attempted to distinguish *Valley Forge* and *Navy Chaplaincy* on the ground that "Doe #1 *is* directly affected by the government action—both its message and its impact on his family." J.A. 202-203 n.11. But the abstract "message" Doe #1 (like Dr. Elshikh) alleges could be asserted by any Muslim in the country—indeed, perhaps by anyone offended by the Order's perceived message. The Fourth Circuit's only purported basis for limiting its conclusion to Doe #1—the speculative delay in the entry of his wife—is now moot, and in any event that asserted injury never stemmed from Doe #1's religion or any violation of his own Establishment Clause rights. See pp. 29-30, *supra*. The same is true of Dr. Elshikh. Neither Doe #1 nor Dr. Elshikh has a cognizable injury under the Establishment Clause, and thus neither can invoke *Mandel* and *Din* to evade the general rule of nonreviewability.

3. Hawaii does not assert any violation of its own constitutional rights

Hawaii's inability to assert a cognizable claim is even more fundamental. Hawaii has no rights to assert under the Establishment Clause and therefore cannot come within *Mandel* and *Din*. Hawaii argued below (*Hawaii* Resps. C.A. Br. 17 (No. 17-15589)) that the Clause originally protected state establishments of religion from the federal government, citing Justice Thomas's concurrence in *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 677-680 (2002). But Hawaii does not seek here to establish its own religion, which it no longer may do in light of the Fourteenth Amendment. *Id.* at 679 n.4. And although Hawaii's residents have Establishment Clause rights, Hawaii "does not have standing as *parens patriae* to bring an action against the Federal Government" to protect its residents from alleged discrimination. *Alfred L.*

Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

Notably, neither the district court nor the Ninth Circuit held that Hawaii had standing based on any injury to putative Establishment Clause rights of the State. Rather, both courts relied on purported injuries to Hawaii's universities, tax revenue from tourism, and efforts to assist in resettling refugees. J.A. 1118-1121, 1150-1151, 1182-1187. But those alleged injuries—which were speculative, not actual or imminent, when respondents filed suit—do not stem from the violation of any constitutional right for which Hawaii might seek limited review under *Mandel* and *Din*. Nor do those alleged injuries even result from application of the Order to the State itself. They are instead merely the incidental effects of the United States' application of federal law to aliens outside the United States.

Although Hawaii also claimed a sovereign interest in applying its own laws to persons once they are present in the State, it has no sovereign or other cognizable interest in regulating or compelling the entry of aliens from abroad in the first instance. "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government." *Arizona* v. *United States*, 567 U.S. 387, 409-410 (2012) (citation omitted). In short, under the INA, Hawaii has no "legally and judicially cognizable" interest, *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997), in the federal government's determination whether to allow an alien abroad to enter the United

States, either on a visa or as a refugee. See *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).[13]

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The courts of appeals in both cases strained to reach the merits despite the absence of any cognizable injury to respondents' own constitutional rights. This Court has not hesitated to overturn lower-court rulings that have similarly disregarded settled justiciability principles to reach significant constitutional issues. See, *e.g.*, *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 340-354 (2006); *Raines*, 521 U.S. at 818-830. The Court should do the same here. The importance of the legal issues implicated by respondents' challenges to the Order does not warrant disregarding foundational rules of nonjusticiability.

II. RESPONDENTS' CHALLENGES TO SECTION 2(C) DID NOT BECOME MOOT ON JUNE 14, 2017

In granting certiorari, this Court directed the parties "to address * * * '[w]hether the challenges to [Section] 2(c) became moot on June 14, 2017,'" *i.e.*, 90 days after the Order's intended effective date of March 16, 2017. *IRAP*, 137 S. Ct. at 2087. They did not become moot at

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[13] Nor may Hawaii assert third-party standing on behalf of aliens who would seek admission as students, faculty, tourists, or refugees. Aliens abroad have no Establishment Clause rights, see *Verdugo-Urquidez*, 494 U.S. at 265, and no constitutional rights at all regarding entry into the country, see p. 26, *supra*. Hawaii cannot assert purported rights on behalf of third parties that those third parties do not possess. Moreover, Hawaii has not shown a "close relationship with" the third parties or a "hindrance" to the third parties' "ability to protect [their] own interests." *Kowalski* v. *Tesmer*, 543 U.S. 125, 129-131 (2004) (citations and internal quotation marks omitted).

that time, but if the Court concludes otherwise it should vacate the judgments below and remand with instructions to dismiss.

A. Section 2(c) of the Order directs that the entry into the United States of nationals of the six listed countries "be suspended for 90 days from the effective date of th[e] [O]rder." J.A. 1426. That effective date was supposed to be March 16, 2017. J.A. 1439 (§ 14). The injunctions in these cases, however, prevented Section 2(c) from becoming "effective" and "suspend[ing]" entry for 90 days after March 16. Because Section 2(c) was enjoined before it could take effect, the 90-day suspension did not begin to run until the injunctions barring its enforcement were stayed by this Court on June 26, 2017. The injunctions thus effectively delayed or tolled the Order's effective date for purposes of Section 2(c) and the other enjoined provisions. As a matter of both background legal principles and common sense, the 90-day period could not elapse before it was ever permitted to begin to run.

Contrary to the *IRAP* respondents' assertion (Stay Opp. 18), the government did not take a different position below. In its stay motion in the court of appeals, the government stated that Section 2(c)'s 90-day suspension "expires in early June." *IRAP* Gov't C.A. Mot. for Stay 11. The government was addressing the assertion by respondent MESA that it had standing because Section 2(c) might interfere with a meeting scheduled for November 2017, five months after Section 2(c)'s suspension was set to expire. *Id.* at 10-11. The government's point was that, if Section 2(c) had been permitted to go into effect *as originally scheduled*, MESA would not have suffered any cognizable injury. See *Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (standing inquiry

"focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed"). The government's statement did not address the effect of the injunctions on the running of the 90-day period, much less endorse the odd notion that Section 2(c)'s suspension could end before it had begun.

B. In any event, a memorandum issued by the President on June 14, 2017, puts the issue to rest. See J.A. 1441-1443 (82 Fed. Reg. 27,965 (June 19, 2017)). The June 14 memorandum provides that each provision's effective date is "the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." J.A. 1442. It further provides that, "[t]o the extent it is necessary, this memorandum should be construed to amend the Executive Order." *Ibid.* Section 2(c)'s 90-day suspension thus did not begin to run until this Court stayed the injunctions on June 26, 2017. The *IRAP* respondents conceded (Br. in Opp. 14) that "the President can unilaterally revise" the Order's temporal scope "at any time." Because the President did so, the appeals did not become moot on June 14, 2017.

C. If the *IRAP* respondents were correct that the appeals are moot, the appropriate course would be to vacate the courts of appeals' judgments upholding the injunctions barring enforcement of Section 2(c) with instructions to dismiss the underlying challenges. This Court's "established practice" when a federal civil case "has become moot while on its way here or pending [the Court's] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); see Stephen M. Shapiro et al., *Supreme Court Practice* § 19.5, at 970-971 (10th ed. 2013).

No exception to that general rule counsels against vacatur here. If respondents' challenges to Section 2(c) are moot, that resulted from the "happenstance" that litigation and appellate review of those challenges spanned longer than 90 days—not because of any "settlement" or other "unilateral" post-judgment action by the government. *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994); see *Alvarez* v. *Smith*, 558 U.S. 87, 94 (2009) (directing vacatur of lower-court judgment with instructions to dismiss because the case "more closely resemble[d] mootness through 'happenstance' than through 'settlement'—at least the kind of settlement that the Court considered in *Bancorp*"). Consistent with its established practice, if the Court concludes that the challenges to Section 2(c) are moot due to the passage of time during this litigation, it should vacate the relevant portions of the courts of appeals' judgments.[14]

III. THE ORDER DOES NOT VIOLATE THE INA

The Ninth Circuit held that Sections 2(c), 6(a), and 6(b) exceed the President's statutory authority under the INA in several respects. Judicial review of the Order on statutory grounds is precluded for the reasons set forth above. See Part I.A, *supra*. In any event, the Ninth Circuit's ruling rests on a fundamental misunderstanding of the statute and allows for impermissible

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[14] Likewise, the *Hawaii* respondents' challenge to Section 6(a)'s 120-day Refugee Program suspension did not become moot on July 14, 2017 (120 days after March 16, 2017), but if it did, vacatur would be appropriate. Section 6(b)'s refugee cap does not present a similar question because its duration is not linked to the Order's effective date, but instead to the end of Fiscal Year 2017, *i.e.*, September 30, 2017. J.A. 1434 (§ 6(b)).

judicial second-guessing of national-security determinations made by the President.

A. Sections 2(c), 6(a), And 6(b) Are Expressly Authorized By 8 U.S.C. 1182(f) And 1185(a)(1)

The Ninth Circuit principally held that Sections 2(c), 6(a), and 6(b) exceed the President's authority to suspend entry under 8 U.S.C. 1182(f) because, in the court's view, the President failed to make a sufficient finding of harm to the national interest. J.A. 1195-1209. The *Hawaii* respondents never advanced that theory in the court of appeals, and for good reason: it has no basis in the statute, contradicts historical practice, and improperly disregards the Order's express findings.

1. Sections 1182(f) and 1185(a)(1) grant the President broad discretion to suspend entry of aliens in the national interest

a. Section 1182(f) provides in pertinent part:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. 1182(f). By its terms, Section 1182(f) grants the President broad authority and confirms his discretion at every turn. It reserves to the President the decisions (1) whether, when, and on what basis to suspend entry "by proclamation" ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); (2) whose entry to suspend ("all aliens or any class of aliens," whether as "immigrants

or nonimmigrants"); (3) for how long ("for such period as he shall deem necessary"); (4) and on what terms ("he may * * * impose on the entry of aliens any restrictions he may deem to be appropriate"). *Ibid.*

As courts have recognized, Section 1182(f) confers a "sweeping proclamation power" to suspend entry of aliens. *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.), aff'd by an equally divided Court, 484 U.S. 1 (1987); see *Allende* v. *Shultz*, 845 F.2d 1111, 1117-1118 (1st Cir. 1988). This Court, for example, deemed it "perfectly clear that [Section] 1182(f) * * * grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993). The breadth of this authority reflects that, "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power," but also "is implementing an inherent executive power." *Knauff*, 338 U.S. at 542.

Section 1185(a)(1) further makes it "unlawful" for an alien to "enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. 1185(a)(1). The Ninth Circuit did not separately analyze Section 1185(a)(1), stating that it "does not grant the President a meaningfully different authority than [Section] 1182(f)." J.A. 1196 n.10. But Section 1185(a)(1)'s additional, express grant of authority to the President confirms his expansive discretion in this area. The plain text of Sections 1182(f) and 1185(a)(1) leaves no doubt that the President may suspend or restrict the entry of the classes covered by Sections 2(c), 6(a), and 6(b).

b. The court of appeals erroneously read into Section 1182(f) a requirement that, when suspending entry, the President must articulate a detailed factual basis—satisfactory to courts—to "support the conclusion that entry of all nationals" whose entry he suspends "would be harmful to the national interest." J.A. 1197. That requirement turns the statute on its head. Section 1182(f)'s language authorizing the President "by proclamation" to suspend or restrict entry "[w]henever [he] finds that [it] would be detrimental to the interests of the United States," 8 U.S.C. 1182(f), does not *constrain* the President's authority. To the contrary, it confirms the breadth of his discretion. Congress placed no restrictions on which "interests" count or what "detriment[s]" suffice for the President to invoke his suspension authority, committing all of those matters to the President's judgment and discretion. And the statute expressly contemplates that he may make these determinations on a broad scale, authorizing him to "suspend the entry of all aliens or any class of aliens." *Ibid.*

The only prerequisite Congress imposed is that the "President find[]" that entry would be detrimental to the Nation's interests, 8 U.S.C. 1182(f)—and the President indisputably made such a finding here. See J.A. 1426, 1433-1434 (§§ 2(c), 6(a) and (b)). By its terms, Section 1182(f) does not impose any further requirements on how the President articulates such findings. In *Doe*, *supra*, confronted with a statute that similarly granted the Director of Central Intelligence authority to terminate an employee if he "*deem*[*s*] such termination necessary or advisable in the interests of the United States," this Court held that judicial review of termination decisions was unavailable under the APA because the Court "s[aw] no basis on which a reviewing

court could properly assess an Agency termination decision." 486 U.S. at 600 (citation omitted). So too here, Section 1182(f) "fairly exudes deference to the [President]" and "appears * * * to foreclose the application of any meaningful judicial standard of review." *Ibid.* Indeed, the President's decisions are not "reviewable for abuse of discretion under the APA" at all. *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992); see *Dalton* v. *Specter*, 511 U.S. 462, 474-476 (1994) (courts may not second-guess determinations vested in the President's discretion). Because neither the APA nor any other statute provides for review, the President's determination "is not subject to review." *United States* v. *George S. Bush & Co.*, 310 U.S. 371, 380 (1940); see *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111-112 (1948).

Deference is especially warranted when the President's determinations concern whether to suspend the entry of aliens—decisions that directly implicate his foreign-affairs and national-security powers and responsibilities. The President generally need not "disclose" his "reasons for deeming nationals of a particular country a special threat," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AAADC*), which may rest on classified or sensitive material. And when the President does disclose his reasons for deeming such nationals to present a risk to national security, courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Ibid.*

Moreover, as this Court recently underscored, "[n]ational-security policy is the prerogative of the Congress and President," and "[j]udicial inquiry into the

national-security realm raises concerns for the separation of powers in trenching on matters committed to the other branches." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citation and internal quotation marks omitted). Courts thus accord "deference to what the Executive Branch has determined is essential to national security." *Ibid.* (ellipsis, citation, and internal quotation marks omitted). The court of appeals fundamentally erred in holding that Section 1182(f) subjects the President's assessment of harm to the Nation's interests to judicial review, under a standard of the court's creation akin to review of agency action under the APA.

c. Historical practice also refutes the Ninth Circuit's misreading of the statute. Presidential orders dating back decades have invoked Section 1182(f) to suspend or restrict entry without a detailed explanation for the finding that entry of particular aliens would be detrimental to this Nation. Some have explained the President's rationale in one or two sentences that broadly declare the Nation's interests.[15] Indeed, the court of appeals acknowledged that some orders have suspended or restricted entry "*not* because of a particular concern that entry of the individuals themselves would be detrimental, but rather, as retaliatory diplomatic measures." J.A. 1201-1202 n.13 (emphasis added); see, *e.g.*, Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986) (suspending entry as immigrants of "all Cuban nationals," with certain exceptions, based

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[15] See, *e.g.*, Proclamation No. 8693, 76 Fed. Reg. 44,751 (July 27, 2011); Proclamation No. 8342, 74 Fed. Reg. 4093 (Jan. 22, 2009); Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996); Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (June 1, 1992); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988); Proclamation No. 5829, 53 Fed. Reg. 22,289 (June 14, 1988).

on decision by the "Government of Cuba * * * to suspend" execution of an "immigration agreement between the United States and Cuba"); cf. *AAADC*, 525 U.S. at 491 ("The Executive should not have to disclose its 'real' reasons * * * for simply wishing to antagonize a particular foreign country by focusing on that country's nationals[.]"). This practice confirms the wide latitude that Section 1182(f) accords the President to determine that suspending entry is in the national interest.

2. The Order is a valid exercise of the President's broad suspension power under Section 1182(f)

The Order clearly finds that the temporary suspensions and refugee cap are in the national interest. That should be the end of the matter. Regardless, the Order amply satisfies any requirement Section 1182(f) imposes.

a. Section 2 is designed to assess what information is needed from foreign governments, whether they are furnishing it, and what further steps are needed. While that review is ongoing, Section 2(c) suspends entry of nationals of six countries that may be especially unwilling or unable to supply needed information, based on extensive findings set forth in the Order. The fact that each of the countries "is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones," both (1) creates a heightened risk that "conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States," where they thereafter may be difficult to "remove," and (2) "diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States." J.A. 1419-1420 (§ 1(d)). Each of the countries already had been designated by

Congress or the Executive as presenting heightened concerns in connection with the Visa Waiver Program. See pp. 4-5, *supra*.

After detailing the deteriorating conditions in each country, J.A. 1420-1422 (§ 1(e)), the President concluded that, "until the assessment of current screening and vetting procedures required by [S]ection 2" is completed, "the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high," J.A. 1423 (§ 1(f)). On that basis—and to reduce investigative burdens while the review of existing procedures is ongoing —the President determined in consultation with Cabinet officials that entry from the six countries (absent an individual waiver) "would be detrimental to the interests of the United States." J.A. 1426 (§ 2(c)). Simply put, because of serious concerns that these foreign governments that sponsor or shelter terrorism may be unable or unwilling to provide needed information, the President placed a 90-day pause on entry of certain of their nationals while the Departments of State and Homeland Security review existing procedures.

In addition, Section 2(c) serves the important goal of helping to persuade foreign countries to supply needed information about their nationals. The history of the Order illustrates this interest: after issuance of the January Order, which included a temporary suspension that encompassed the same six countries plus Iraq, "the Iraqi government * * * expressly undert[ook] steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal." J.A. 1423-1424 (§ 1(g)). One purpose of the Order is to persuade other countries to do the same,

because after the Departments of State and Homeland Security complete their worldwide review, the President will determine what steps to take with regard to countries that do not provide information necessary to properly screen their nationals. J.A. 1427 (§ 2(e)).

b. Section 6(a)'s Refugee Program suspension and Section 6(b)'s refugee cap similarly rest on the President's judgment that those measures are called for by the national interest. The President determined that the Refugee Program is a means of entry would-be terrorists may seek to exploit. As the Order explains, the January Order it replaced had "temporarily suspended the [Refugee Program] pending a review of our procedures for screening and vetting refugees" because "[t]errorist groups have sought to infiltrate several nations through refugee programs." J.A. 1418 (§ 1(b)(iii)). The Order also notes that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation" and some have been "convicted of terrorism-related crimes." J.A. 1424 (§ 1(h)). Section 6(b)'s reduction of the maximum number of refugees who may be admitted in Fiscal Year 2017 similarly rests on an express finding that entry of more than 50,000 "would be detrimental to the interests of the United States." J.A. 1434. This is more than sufficient to support the President's conclusion that the refugee provisions are in furtherance of the national interest.

3. *The Ninth Circuit's reasons for deeming the Order's determinations insufficient lack merit*

a. The Ninth Circuit deemed the national-security justification for Section 2(c)'s entry suspension inadequate because the Order does not find "that nationality alone renders entry of" the covered individuals "a

heightened security risk." J.A. 1200. "The Order," the court held, "does not tie these nationals" to "terrorist organizations," "identify these nationals as contributors to active conflict," or show a "link between an individual's nationality and their propensity to commit terrorism." J.A. 1200-1201. The court also cited a purported leaked "draft DHS report" stating that citizenship "is unlikely to be a reliable indicator of potential terrorist activity." J.A. 1226 n.23 (citation omitted); see J.A. 1173-1174; see also J.A. 225; 16-1540 Resps. Cert. Supp. Br. 23. Section 1182(f), however, does not require an individualized risk determination as to each alien covered by a suspension. It expressly authorizes the President to suspend entry of "all aliens or any class of aliens," 8 U.S.C. 1182(f), which cannot sensibly be understood to require an assessment of the risks posed by each individual alien.

More fundamentally, the Ninth Circuit misunderstood the basis for the Order. The President did not determine that all nationals of the six countries are likely terrorists. Rather, given his assessment of future threats and risk tolerance, he determined that certain foreign governments—especially those that sponsor or shelter terrorism—may not be able and willing to provide sufficiently complete and reliable information needed to "tie" their nationals to "terrorist organizations," "identify" them "as contributors to active conflict," or establish a "link" between them and "their propensity to commit terrorism." J.A. 1200-1201. A principal purpose of the 90-day pause—and the accompanying review and report of screening and vetting for all foreign nations, J.A. 1419-1420, 1425-1426 (§§ 1(d), 2(a) and (b))—is thus to gather some of the information that

the court of appeals faulted the President for not already possessing.

The Ninth Circuit deemed that concern insufficient to justify Section 2(c) because the Order did not affirmatively find that existing information-sharing procedures are in fact inadequate. J.A. 1203-1204. In the court's view, the government currently has sufficient tools at its disposal to ensure the reliability of such information. *Ibid.* The court also cited the opinions of former national-security officials that Section 2(c) was unnecessary to address any terrorism threat extant at the close of the prior Administration. J.A. 1226 n.23; see J.A. 225. But under Section 1182(f), the *current* President is entitled to look at the same information relied upon by the prior Administration or Congress in deciding that the six countries at issue were of special concern, and to make his own judgment as to how much risk to tolerate.

The President's "[p]redictive judgment[s]" in this area warrant the utmost deference. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527-529 (1988). Especially "when it comes to collecting evidence and drawing factual inferences" in the national-security context, "the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (*HLP*) (citation omitted). The President was entitled to assess the situation and reach a different conclusion than the court of appeals or his predecessors. The Ninth Circuit's decision, in contrast, subjugates the Executive's national-security judgment to that of courts

and freezes into place the policy judgments made by prior Administrations.[16]

b. The Ninth Circuit gave equally short shrift to the Order's assessment of risks related to Section 6's refugee provisions, which the *Hawaii* respondents barely mentioned in originally seeking to restrain the Order. As to Section 6(a), the court stated that the Order "does not reveal any threat or harm to warrant suspension of" the Refugee Program or find that "present vetting and screening procedures are inadequate," and that the Order's stated goal of facilitating a review "do[es] not support a finding that the travel and admission of refugees would be detrimental to the interests of the United States." J.A. 1207-1208. As with Section 2(c), however, a principal purpose of Section 6(a)'s suspension is to allow a review precisely to determine whether adequate screening is in place. J.A. 1433-1434 (§ 6(a)). The Order notes that terrorist groups have entered other countries through refugee programs and that hundreds of persons who originally entered this country as refugees

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[16] It is no answer to say, as the court of appeals did, that the Order is overinclusive and underinclusive, because it encompasses some nationals who currently lack significant ties to their home countries, while omitting other aliens who are not nationals of, but have close ties to, the listed countries. J.A. 1202-1203. Whatever finding of a detriment to the national interest Section 1182(f) might be construed to require, nothing in the statute requires that the means the President adopts be narrowly tailored or authorizes second-guessing his determination of the appropriate scope of a suspension. In any event, the line Section 2(c) draws reflects the President's determination that information is needed from foreign governments about their own nationals. Indeed, the Order expressly excludes dual nationals traveling on a passport not issued by one of the six countries. J.A. 1428 (§ 3(b)(iv)).

are or have been the subjects of counterterrorism investigations (and some have been convicted of terrorism-related crimes). J.A. 1418, 1424 (§ 1(b)(iii) and (h)). The President acted well within his authority in determining that potential terrorist infiltration of refugee programs warranted a temporary pause in refugee admissions while the government assessed that threat.

The Ninth Circuit similarly believed that the Order fails to justify limiting the number of refugees to 50,000. J.A. 1208-1209. But after reciting the number of refugee-related counterterrorism investigations, the Order expressly states "that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." J.A. 1434 (§ 6(b)). Section 1182(f) required nothing more. The court apparently believed that Section 6(b) is invalid because, having already recited refugee-related risks, the Order does not provide sufficient detail why those refugee-related risks justify a cap of 50,000 refugees. But when the Executive adopts "a preventive measure * * * in the context of international affairs and national security," it "is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *HLP*, 561 U.S. at 35. All Section 1182(f) required is that the President find that entry of more than 50,000 refugees would be "detrimental" to the Nation's interests. That is precisely what he did.

B. Section 2(c) Is Consistent With 8 U.S.C. 1152(a)

The Ninth Circuit also held that Section 2(c)'s entry suspension of certain nationals of six countries violates 8 U.S.C. 1152(a)(1)(A), which prohibits "discriminat[ing]" or granting a "preference or priority" in the "issuance of an immigrant visa" for various reasons, including because

of an alien's "nationality." J.A. 1209-1216 (citation omitted). The Ninth Circuit's holding is wrong. And even if it were right, it could not support the injunction the court affirmed.

1. There is no conflict between Section 1152(a) and the President's exercise of his authority under Sections 1182(f) and 1185(a)(1)

According to the Ninth Circuit, Section 2(c)'s entry suspension violates Section 1152(a)(1)(A) because the suspension is implemented by denying visas to certain nationals of the six countries who do not qualify for a waiver. J.A. 1209-1212. The Ninth Circuit reasoned that Section 1152(a)(1)(A) must "cabin[] the President's authority under [Section] 1182(f)," because otherwise the President could invoke his suspension authority to "circumvent the limitations set by [Section] 1152(a)(1)(A)." J.A. 1212-1213. That reasoning creates a conflict between the statutes where none exists, disregards settled historical practice, and raises serious questions about Section 1152(a)(1)(A)'s constitutionality.

a. "[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (citation omitted). Only when statutes are "in 'irreconcilable conflict' in the sense that there is a positive repugnancy between them or that they cannot mutually coexist" may courts construe one provision as implicitly superseding the other. *Ibid.* (citation omitted). Here, there is no conflict between Sections 1152(a)(1)(A) and 1182(f) because Section 1152(a)(1)(A) does not compel the issuance of a visa to an alien who is validly barred from entering the country, including under a suspension proclamation issued pursuant to Section 1182(f).

Visas are issued by consular officers, and a visa allows an alien to "obtain transportation to the United States" and seek admission at a port of entry. 1 Charles Gordon et al., *Immigration Law and Procedure* § 8.04[1] (2016). But Congress has directed that a visa may not be issued if the applicant "is ineligible to receive a visa * * * under [S]ection 1182." 8 U.S.C. 1201(g). Section 1182 lists many such grounds for ineligibility—among them health, criminal history, and terrorist affiliation. Whatever the relevant underlying ground in any individual case, the alien is denied a visa because he is "ineligible" to enter "under [S]ection 1182." *Ibid.*

That is true of aliens who are ineligible to enter because they are subject to a suspension of entry under Section 1182(f)—including aliens subject to Section 2(c) of the Order. The Department of State treats aliens covered by exercises of the President's Section 1182(f) authority as ineligible for visas. See U.S. Dep't of State, 9 *Foreign Affairs Manual* 302.14-3(B) (2016). Thus, if an alien is subject to Section 2(c) and does not qualify for a waiver, he is denied an immigrant visa because he is ineligible to receive one as someone barred from entering the country under Section 1182(f)—not because he is suffering the type of nationality-based discrimination prohibited by Section 1152(a)(1)(A). Section 1152(a)(1)(A) is concerned with the allocation of visas among aliens who are eligible to receive them. Moreover, it would make little sense to issue a visa to an alien who the consular officer already knows is barred from entering the country, only for the alien to be denied entry upon arrival at this Nation's borders. A visa does not entitle the alien to be admitted if, upon arrival, "he is found to be inadmissible." 8 U.S.C. 1201(h).

b. History strongly supports this relationship between the statutes. Section 1152(a) has never been viewed as a constraint on the President's suspension authority, and Presidents have invoked Section 1182(f) to draw distinctions based in part on nationality. For example, President Reagan invoked Section 1182(f) to "suspend entry into the United States as immigrants by all Cuban nationals," subject to exceptions. Proclamation No. 5517, 51 Fed. Reg. at 30,470. He and other Presidents also invoked it to suspend entry of members and officials of particular foreign governments. See, *e.g.*, Proclamation No. 6958, 61 Fed. Reg. 60,007 (Nov. 26, 1996) (Sudanese government officials); Proclamation No. 5887, 53 Fed. Reg. 43,185 (Oct. 26, 1988) (Nicaraguan government officials). And this Court has deemed it "perfectly clear" that Section 1182(f) would authorize a "naval blockade" against illegal migrants from a particular country. *Haitian Ctrs. Council*, 509 U.S. at 187.

In addition, the other statute that the Order invokes for Section 2(c)'s suspension, 8 U.S.C. 1185(a)(1), subjects aliens' entry "to such limitations and exceptions as the President may prescribe." That provision likewise has been understood to authorize distinctions based on nationality. Thus, in 1979, the Office of Legal Counsel construed it as authorizing the President to "declare that the admission of Iranians or certain classes of Iranians would be detrimental to the interests of the United States." *Immigration Laws and Iranian Students*, 4A Op. O.L.C. 133, 140 (1979). Two weeks later, President Carter invoked Section 1185(a) to direct the Secretary of State and the Attorney General to adopt "limitations and exceptions" regarding "entry" of "Iranians holding nonimmigrant visas." Exec. Order No. 12,172,

44 Fed. Reg. 67,947 (Nov. 26, 1979); see *Nademi* v. *INS*, 679 F.2d 811, 814 (10th Cir.), cert. denied, 459 U.S. 872 (1982). President Carter subsequently amended that directive to make it applicable to all Iranians. See Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (Apr. 7, 1980).

As the history makes clear, both Sections 1182(f) and 1185(a)(1) allow the President to determine that certain aliens will not be permitted to enter the United States, including for reasons of nationality. Section 1152(a)(1)(A), by contrast, addresses the aliens who *are* otherwise eligible for a visa—and for those aliens, the government may not discriminate in issuing immigrant visas on grounds such as race, sex, or nationality. The Ninth Circuit was simply mistaken in believing that Section 1152(a)(1)(A)'s rule for immigrant-visa issuance applies to aliens whom the President has validly suspended from entry under Section 1182(f).

c. The Ninth Circuit's contrary conclusion raises serious constitutional questions that this Court must avoid if possible. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Construing Section 1152(a)(1)(A) to prevent the President from exercising his statutory power to suspend entry based in part on nationality would undermine the President's Article II authority as Commander-in-Chief and his power over foreign affairs. For example, the court of appeals' holding means that, as a statutory matter, the President cannot temporarily suspend the entry of aliens from a specific country, even if he is aware of a grave threat from unidentified nationals of that country or the United States is on the brink of war with that country. Section 1152(a)(1)(A) can and should be construed to avoid that serious constitutional question.

2. In the event of a conflict, the President's exercise of his authority under Sections 1182(f) and 1185(a)(1) prevails

Even if Section 1152(a)(1)(A) did conflict with Section 1182(f), the Ninth Circuit's conclusion that the latter must yield to the former still is incorrect for at least two reasons.

First, Section 1152(a)(1)(A) contains no clear indication that Congress intended its limitation on immigrant-visa issuance by consular officers to supersede the *President's* authority to suspend entry. "While a later enacted statute * * * can sometimes operate to amend or even repeal an earlier statutory provision[,] * * * repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (brackets in original; citation and internal quotation marks omitted). The same is true of "implied amendments," which "are no more favored than implied repeals." *Id.* at 664 n.8. Although Section 1152(a)(1)(A) was enacted later in time (in 1965) than Section 1182(f) (in 1952), nothing in Section 1152(a)(1)(A)'s text—which does not mention entry or the President—demonstrates a "clear and manifest" congressional intent to narrow Section 1182(f)'s special grant of authority. *Id.* at 662 (citation omitted).

Second, although Section 1152(a)(1)(A) was enacted later in time, Section 1182(f) is more specific. Whereas Section 1152(a)(1)(A) sets a general rule prohibiting discrimination or preferences on various grounds in the issuance of immigrant visas, Section 1182(f) confers special power on the President to suspend or restrict entry of particular classes of aliens when he finds that

their entry would be detrimental to the Nation's interests. That unique grant of authority to the President himself to bar entry of aliens, and thereby render them ineligible for visas, is more specific than Section 1152(a)(1)(A)'s general rule. Moreover, Section 1152(a)(1)(A) was adopted before Section 1185(a)(1) was modified to its current form in 1978—leaving Section 1185(a)(1) as the latest provision in time and thus the controlling one even on respondents' approach. See Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 707(a), 92 Stat. 992-993 (1978).

3. Even if Section 1152(a) prevails, it cannot justify the present injunction

Even if the Ninth Circuit's statutory interpretation were correct, it would not support enjoining all enforcement of Section 2(c). Courts may find an implied repeal "only to the minimum extent necessary" to "make the later enacted law work." *Radzanower*, 426 U.S. at 155 (brackets and citation omitted). The court of appeals' ruling contravenes that principle in two ways.

First, if Section 1152(a)(1)(A) did prohibit the government from declining to issue immigrant visas to aliens covered by Section 2(c), in no event can it be construed to forbid the President from denying them *entry*. Any possible concern that denying visas to aliens covered by Section 2(c) constitutes "circumvent[ion]" of Section 1152(a)(1)(A) (J.A. 1212) would be fully addressed by an injunction requiring the issuance of such visas to aliens who otherwise qualify for them. There is no basis in the statute to go further by enjoining Section 2(c)'s entry suspension itself.

Second, Section 1152(a)(1)(A) is expressly limited to "immigrant visa[s]." 8 U.S.C. 1152(a)(1)(A). It thus cannot justify enjoining Section 2(c) as to aliens seeking

nonimmigrant visas. Over the last two fiscal years, more than two-thirds of visas issued to nationals of the six countries covered by the Order were nonimmigrant visas.[17] Even on its own terms, then, the court of appeals' statutory analysis cannot support the injunction as to the vast majority of aliens affected by Section 2(c). See J.A. 1233 n.24 (noting but declining to address this issue in light of court's holding that Section 2(c) violates Section 1182(f)). Section 1152(a)(1)(A) thus provides no independent basis for enjoining Section 2(c) wholesale.

C. Section 2(c) Is Consistent With 8 U.S.C. 1182(a)

The *Hawaii* respondents also have pressed (Cert. Supp. Br. 20-22) an additional statutory argument that the Ninth Circuit did not reach: that Section 2(c) violates 8 U.S.C. 1182(a)(3)(B), which provides that aliens who have engaged in terrorist activity or have certain ties to terrorist groups are inadmissible. According to respondents, the President has impermissibly augmented Congress's standard for the admissibility of aliens with ties to terrorism. J.A. 1221. That argument lacks merit.

First, as respondents' own authority confirms, the President may invoke Section 1182(f) to suspend entry for reasons that are related to ineligibility grounds in Section 1182(a). As then-Judge Ginsburg explained for the D.C. Circuit in *Abourezk*, Section 1182(f)'s "sweeping proclamation power * * * provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in

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[17] See Bureau of Consular Affairs, U.S. Dep't of State, *Report of the Visa Office 2016*, Tbl. III, XVIII, https://goo.gl/vIqklv (all undated Internet sites last visited Aug. 10, 2017); Bureau of Consular Affairs, U.S. Dep't of State, *Report of the Visa Office 2015*, Tbl. III, XVIII, https://goo.gl/9BbEFt.

[S]ection 1182(a)." 785 F.2d at 1049 n.2; accord *Allende*, 845 F.2d at 1118 & n.13. The *Hawaii* respondents conceded below that the President may invoke Section 1182(f) to exclude aliens "who present concerns similar to" one of Section 1182(a)'s categories, so long as he does not exclude one of the exact same categories under a different "burden of proof." *Hawaii* D. Ct. Doc. 191, at 12 (Mar. 14, 2017).

The Order complies with respondents' own test. In Section 1182(a)(3)(B), Congress addressed the admissibility of aliens who have been linked *individually* to terrorist activity or groups. But the President suspended entry of a different "class of cases": aliens attempting to enter the United States from *countries* that shelter or sponsor terrorism. *Abourezk*, 785 F.2d at 1049 n.2. And he did so to guard against a "danger" that is "not covered" by Section 1182(a)(3)(B): the risk that those countries' hostile or unstable governments are not providing complete and reliable information regarding their nationals. *Ibid.* The Order does not alter Section 1182(a)(3)(B)'s "burden of proof" by suspending the entry of covered aliens based on a determination they are all "potential terrorists." *Hawaii* Resps. C.A. Br. 32 (No. 17-15589). Rather, the Order states that conditions in the six countries warrant temporarily suspending entry of certain of those countries' nationals pending a review of screening and vetting procedures. J.A. 1419-1423 (§ 1(d)-(f)). Nothing in Section 1182(a) precludes that judgment.

Second, construing Section 1182(a)(3)(B) to preclude the President from suspending entry under Section 1182(f) based on terrorism-related risks would render Section 1182(f) largely impotent. Section 1182(a) sets forth numerous grounds of inadmissibility, including grounds relating to "[h]ealth[]," "[c]riminal" history,

"[s]ecurity," and "[f]oreign policy." 8 U.S.C. 1182(a)(1), (2), (3), and (3)(C). Given the breadth and variety of those grounds, few exercises of the President's Section 1182(f) authority could not be characterized as touching a topic addressed in Section 1182(a). Indeed, the Executive frequently has suspended entry of aliens under Section 1182(f) for reasons similar to statutory grounds for inadmissibility.[18] So too here, the exclusion for any particular alien who has "engaged in" or "is likely to engage" in "terrorist activity" does not bar the President from temporarily suspending entry by a class of aliens to assess whether existing procedures are adequate to detect potential terrorists.

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[18] For example, Congress identified certain crimes that render aliens inadmissible, 8 U.S.C. 1182(a)(2) (crimes "involving moral turpitude" or drug-related offenses), yet Presidents have invoked Section 1182(f) to suspend the entry of aliens whose conduct does or likely would constitute other crimes. See, *e.g.*, Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015) (certain "malicious cyber-enabled activities" abroad that would harm the United States); Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 14, 2004) (public corruption). Similarly, Congress rendered inadmissible aliens who have participated in certain human-rights violations, including "genocide," "torture," and "extrajudicial killing," 8 U.S.C. 1182(a)(3)(E)(ii)-(iii), yet Presidents have invoked Section 1182(f) to suspend entry of aliens linked to other human-rights abuses. See, *e.g.*, Exec. Order No. 13,692, 80 Fed. Reg. 12,747 (Mar. 8, 2015) (aliens who participated in "conduct that constitutes a serious abuse or violation of human rights" in Venezuela); Exec. Order No. 13,606, 77 Fed. Reg. 24,571 (Apr. 22, 2012) (operation of technology or networks used to assist in "serious human rights abuses" by Iran or Syria); Proclamation No. 8697, 76 Fed. Reg. 49,277 (Aug. 9, 2011) (aliens who participated in "war crimes, crimes against humanity or other serious violations of human rights"); Proclamation No. 8015, 71 Fed. Reg. 28,541 (May 16, 2006) ("human rights abuses" and other activities by officials in Belarus).

D. Section 6(b) Is Consistent With 8 U.S.C. 1157

The Ninth Circuit also incorrectly held that Section 6(b)'s reduction of the refugee cap for Fiscal Year 2017, which the *Hawaii* respondents barely addressed below, violates 8 U.S.C. 1157. J.A. 1216-1221. Section 1157 establishes a procedure for setting the maximum number of refugees who may be admitted each fiscal year. 8 U.S.C. 1157(a)(2). It provides that "the number of refugees who *may* be admitted" in any fiscal year "shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation." *Ibid.* (emphasis added). The statute prescribes a process for "appropriate consultation," involving in-person meetings among Cabinet-level officials and congressional leaders, to set that annual ceiling. 8 U.S.C. 1157(e). If an "unforeseen emergency refugee situation" arises mid-year, the President may (after "appropriate consultation") set a higher ceiling. 8 U.S.C. 1157(b).

The Ninth Circuit held that Section 6(b) violates Section 1157 because the maximum number of refugees for Fiscal Year 2017 was previously set at 110,000, and Section 6(b) reduced that number without "appropriate consultation." J.A. 1216-1221. Section 1157(a)(2), however, sets only the number who "may be admitted," not a number who *must* be admitted. Although the President cannot *increase* mid-year the number of refugees who may be admitted without "appropriate consultation," nothing in the statute requires that the maximum number of refugees set at the beginning of the fiscal year actually be admitted or prohibits the President from allowing only a smaller number.

That makes perfect sense. Congress wanted refugee admissions to be limited, with its leadership involved in setting an annual ceiling on refugee admissions and in

deciding whether to exceed that limit mid-year due to unanticipated events. "[C]onsultation with Congress with respect to numbers of refugees admitted is only required when the [statutory] limit is exceeded." H.R. Rep. No. 608, 96th Cong., 1st Sess. 10 (1979). In any given year, however, a smaller number than the annual ceiling might be admitted for many reasons—such as budgetary constraints, logistical concerns, or foreign-relations issues. Indeed, the number of refugees actually admitted routinely falls well below the predetermined cap. For example, from 2001 to 2012, the number of refugees admitted fell short of the annual cap by an average of nearly 21,000, and in 2002 and 2003 fewer than half of the then-authorized 70,000 refugees were admitted.[19] Nothing in Section 1157 mandates admitting a fixed number of refugees—especially where the President determines under Section 1182(f) that the national interest requires admitting a smaller number.

The Ninth Circuit misconstrued Section 1157(a) to set not only a ceiling on refugee admissions, but also a "floor." J.A. 1218. The court stated that "the number of refugees who may be admitted *shall be* the number determined by the President" after appropriate consultation, *ibid.*, but it glossed over the critical discretionary language: "may be admitted." The court also asserted that a contrary view would render Section 1157's procedures superfluous. *Ibid.* That is wrong: if the President desires to *increase* the ceiling mid-year,

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[19] See Refugee Processing Ctr., Bureau of Population, Refugee & Migration, U.S. Dep't of State, *Cumulative Summary of Refugee Admissions* (May 31, 2017), https://goo.gl/LyoOl1; see also Migration Policy Inst., *U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present*, https://goo.gl/0XI98I.

he must utilize Section 1157's protocol. The Ninth Circuit further asserted that Section 1157 supersedes Section 1182(f) because it is later in time and more specific. J.A. 1218-1221. Those attributes are immaterial because the provisions do not conflict. Section 1182(f) authorizes the President to suspend or restrict entry. That is entirely consistent with Section 1157, which merely sets a cap on refugee admissions.

IV. THE ORDER DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

In *IRAP*, the court of appeals held that Section 2(c)'s temporary suspension likely violates the Establishment Clause. J.A. 207-236. In *Hawaii*, respondents have contended, and the district court held, that Section 2(c), Section 6(a)'s refugee suspension, and Section 6(b)'s refugee cap are invalid on the same basis. J.A. 1128-1139, 1154-1157. Under this Court's precedent, however, the President's national-security determinations provide "a facially legitimate and bona fide reason" for the Order's exclusion of aliens. *Mandel*, 408 U.S. at 770. That should end the inquiry. The lower courts reached a contrary conclusion by disregarding *Mandel*'s deferential standard and looking instead to inapposite domestic Establishment Clause cases. But the Order is valid under that improper approach as well. This Court's decisions and respect for a coordinate branch forbid invalidating the President's religion-neutral action not because of what it says or does, but because of what courts speculate motivated the President in issuing it.

A. The Order Is Constitutional Under *Mandel* And *Din*

1. a. The Fourth Circuit acknowledged that the *IRAP* respondents' Establishment Clause challenge to the exclusion of aliens abroad is governed by *Mandel*'s

test, J.A. 208—a test this Court recently described as "minimal scrutiny (rational-basis review)." *Sessions* v. *Morales-Santana*, No. 15-1191 (June 12, 2017), slip op. 15; accord J.A. 210 n.14 (collecting cases that have "equated" *Mandel* with "rational basis review"); see also *Washington* v. *Trump*, 858 F.3d 1168, 1179 (2017) (Bybee, J., dissenting).

In *Mandel*, the Executive denied admission to a Belgian journalist, Ernest Mandel, who wished to speak about communism. 408 U.S. at 756-759. This Court upheld the Executive's action—and rejected a First Amendment challenge by U.S. citizens who wished to hear Mandel speak—because the Attorney General (through his delegee) gave "a facially legitimate and bona fide reason" for Mandel's exclusion: Mandel had violated the conditions of a previous visa. *Id.* at 770; see *id.* at 759, 769. When the Executive supplies such a reason, "courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the" asserted constitutional rights of U.S. citizens. *Id.* at 770.

That deferential standard reflects the Constitution's "exclusive[]" allocation of power over the admission of aliens to the "political branches." *Mandel*, 408 U.S. at 765 (citation omitted); see *Fiallo*, 430 U.S. at 792-796 (applying *Mandel*'s test to equal-protection challenge to statute governing admission of aliens). It also reflects that aliens seeking admission from abroad have no constitutional rights at all regarding entry into the country. In this context, *Mandel*'s test of "a facially legitimate and bona fide reason" for exclusion, 408 U.S. at 770, is necessary to respect the several constitutional values at stake, even if a further assessment might be called for in certain purely domestic contexts. See

Demore v. *Kim*, 538 U.S. 510, 521 (2003) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." (citation omitted)).

Mandel's test has particular force here for three reasons. First, courts are generally "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of the Executive's "reasons for deeming nationals of a particular country a special threat." *AAADC*, 525 U.S. at 491. Those limitations make it especially appropriate to apply *Mandel*'s objective "rational-basis" standard, *Morales-Santana*, slip op. 15, which does not entail probing government officials' subjective intentions or second-guessing the Executive's national-security determinations. See *Western & S. Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U.S. 648, 671-672 (1981) (Rational-basis standard does not ask "whether *in fact* [a] provision will accomplish its objectives," but whether the government "*rationally could have believed*" that it would do so.).

Second, in Sections 1182(f) and 1185(a)(1), Congress expressly granted the President expansive authority to suspend entry of classes of aliens abroad. The President's exercise of that power is parallel to Congress's legislative determinations regarding admissibility of classes of aliens, see 8 U.S.C. 1182(a), which are reviewed under the "facially legitimate and bona fide reason" test, see *Fiallo*, 430 U.S. at 794-795. It is therefore entitled to the same standard of judicial review as well.

Third, Congress vested that expansive authority directly in the President himself, in recognition of his unique role in the constitutional structure over matters of foreign affairs and national security. Congress's expansive grant of authority means that the President's

power "is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2083-2084 (2015) (citation omitted).

b. *Mandel* compels rejecting respondents' constitutional challenges. The Fourth Circuit accepted that Section 2(c)'s entry suspension rests on a facially legitimate reason: protecting national security. J.A. 214. And the Order supplies a bona fide factual basis for that reason: Section 1(d) explains that Congress or the Executive previously designated the six listed countries as presenting terrorism-related concerns that "diminish[] the foreign government's willingness or ability to share or validate important information about" its nationals. J.A. 1419-1420. Section 1(e) then details, country by country, why each poses "heightened risks." J.A. 1420-1422. Neither the *IRAP* respondents nor the Fourth Circuit contested these determinations.

On that basis, Sections 1(f) and 2(c) then set forth the President's judgment that a temporary pause in entry is needed to "prevent infiltration by foreign terrorists" and "reduce investigative burdens" while a review of the Nation's screening and vetting procedures is ongoing. J.A. 1426; see J.A. 1422-1423. Moreover, as Section 2(e) contemplates, and as the example of Iraq's response to the January Order illustrates, the six-country suspension enhances the government's leverage in persuading foreign nations to supply needed information. Section 2(c) readily satisfies *Mandel*'s test.

Section 6(a)'s Refugee Program suspension and Section 6(b)'s refugee cap likewise are valid under *Mandel*. In light of past efforts by terrorist groups to infiltrate countries through refugee programs and the presence of hundreds of persons in the United States who entered as

refugees and are currently the subject of counterterrorism investigations, J.A. 1418, 1424 (§ 1(b)(iii) and (h)), the President made a national-security judgment to suspend decisions and travel under the Refugee Program (subject to individualized waivers) for 120 days. That pause allows for a review "to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States." J.A. 1433 (§ 6(a)). For the same reasons, Section 6(b) limits the number of refugees entering in Fiscal Year 2017 based on an express determination that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." J.A. 1434 (§ 6(b)).

2. The Fourth Circuit failed to accord the deference to the Executive that *Mandel* requires. It noted that the political branches' decisions in the immigration context are still "subject to important constitutional limitations." J.A. 211 (citation omitted). But *Mandel* establishes how those limitations apply with respect to the exclusion of aliens abroad.[20] The Fourth Circuit mistakenly treated *Mandel*'s "bona fide" requirement as a license to examine whether the President's stated reason was given "in good faith." J.A. 212. Under *Mandel*, courts indeed can ensure that the reason is facially bona fide as well as facially legitimate, *i.e.*, that there is a "rational[]" basis for the government's action,

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[20] *Mandel*'s standard applies to respondents' challenges here to decisions to deny entry by aliens from abroad. It does not govern every issue concerning immigration—such as post-removal-order detention of aliens in the United States, *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), or the procedure for exercising legislative power over the suspension of deportation of aliens present in the United States, *INS* v. *Chadha*, 462 U.S. 919 (1983).

Morales-Santana, slip op. 15. *Mandel*, however, explicitly rejected "look[ing] behind" the government's stated reason. 408 U.S. at 770. Indeed, the Court declined Justice Marshall's invitation in dissent to take "[e]ven the briefest peek behind the Attorney General's reason for refusing a waiver," which he asserted was a "sham." *Id.* at 778. The court of appeals' approach cannot be squared with what *Mandel* said or what it did.

The Fourth Circuit based its approach on a statement in Justice Kennedy's concurrence in *Din* addressing a markedly different situation. J.A. 212-215. There, a U.S. citizen claimed that she had a due-process right to receive a more extensive explanation for a consular officer's denial of a visa to her husband. 135 S. Ct. at 2131 (opinion of Scalia, J.). In rejecting that claim, Justice Kennedy (joined by Justice Alito) observed that the government's citation of a statutory ground of inadmissibility involving terrorism "indicates it relied upon a bona fide *factual basis* for denying [the] visa." *Id.* at 2140 (emphasis added). Justice Kennedy concluded that, "[a]bsent an affirmative showing of bad faith on the part of the consular officer who denied [the] visa—which [the U.S.-citizen plaintiff] ha[d] not plausibly alleged with sufficient particularity—*Mandel* instructs [courts] not to 'look behind' the Government's exclusion of [the husband] for additional factual details beyond what its express reliance on [the statute] encompassed." *Ibid.*

That statement cannot plausibly be read as approving a wide-ranging search for pretext in reviewing a consular officer's visa-refusal decision—let alone a formal national-security determination by the President to suspend entry of classes of aliens. Rather, Justice Kennedy posited a far narrower scenario: the statutory

ground of inadmissibility in 8 U.S.C. 1182(a)(3)(B) "specifies discrete factual predicates." 135 S. Ct. at 2141. Ordinarily, a citation of the statute alone will suffice to indicate that those predicates have been found. But in an extreme case, where a citizen makes an "affirmative showing" that a consular officer had no "bona fide factual basis" for determining that an applicant has ties to terrorism, due process might entitle the citizen to "additional factual details" about the basis of the consular officer's decision (provided the information is not classified). *Id.* at 2140-2141.

That type of inquiry would be inapposite here for two independent reasons. First, neither of the statutes that authorize the President's suspension specifies *any* particular factual predicates. Under Section 1182(f), the President need only determine that, in his judgment, entry "would be detrimental to the interests of the United States." And Section 1185(a)(1) imposes no prerequisites at all, but simply mandates compliance with "such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." Second, the Fourth Circuit did not question that the terrorism-related grounds set forth in the Order provide an adequate factual basis for Section 2(c)'s temporary suspension. The Fourth Circuit held instead that national security was not the "primary" purpose of the Order. See J.A. 224-226. But nothing in *Mandel* or *Din* permitted looking behind the President's determination *notwithstanding* its sufficient factual basis, in a search for a contrary subjective motivation.

After reading *Din* to authorize an inquiry into the President's motives, the Fourth Circuit then relied on domestic Establishment Clause decisions as further

justification for setting aside Section 2(c). J.A. 216-217. That unprecedented approach is deeply flawed. It defeats *Mandel*'s central point that the exclusion of aliens abroad, over which the political branches have broad authority, calls for especially deferential review. 408 U.S. at 769-770. And domestic case law—involving local religious displays, subsidies for religious schools, and the like—has no sensible application to the President's foreign-policy, national-security, and immigration judgments. The "unreasoned assumption that courts should simply plop Establishment Clause cases from the domestic context over to the foreign affairs context ignores the realities of our world." *Washington*, 858 F.3d at 1178 n.6 (Bybee, J., dissenting). This Court should reject such "intrusion of the judicial power into foreign affairs" committed to the political branches. *Id.* at 1172 n.2 (Kozinski, J., dissenting).

Moreover, the Fourth Circuit did not need to reach any of this. Even if *Din* could fairly be read to allow a bad-faith inquiry that turns on a consular officer's subjective motive, and even assuming such an inquiry applies to a national-security directive of the President, it would at least require the clearest affirmative showing of bad faith by the President and Cabinet officials. Respondents have not cleared that high bar. To the contrary, the President's actions in response to concerns raised by courts regarding the January Order demonstrate *good faith*. For instance, as the Order explains, the January Order contained two provisions aimed at aiding victims of religious persecution. J.A. 1419 (§ 1(b)(iv)). The President removed them to make clear that national security, not religion, is the Order's focus. That response to courts' concerns is the opposite of bad faith.

B. The Order Is Constitutional Under Domestic Establishment Clause Precedent

After rejecting *Mandel*'s deferential standard of review, the Fourth Circuit held that Section 2(c) likely violates the Establishment Clause by reaching back in time to campaign statements long before development of the Order, and the *Hawaii* district court reached the same conclusion as to Section 6(a) and (b). That approach is impermissible under any legal standard. Section 2(c) is not a so-called "Muslim ban," and campaign comments cannot change that basic fact. Section 6(a) and (b) are not even arguably related to religion.

1. Even assuming that domestic Establishment Clause precedent were applicable—and further assuming that the secular-purpose prong of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and the "endorsement" test, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring), provide the relevant standard—courts deciding whether official action has an improper religious purpose look to "the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 862 (2005) (citation omitted). They should not engage in "judicial psychoanalysis of a drafter's heart of hearts." *Ibid.* Searching for purpose outside the operative terms of governmental action makes no sense in the Establishment Clause context, because it is only an "official objective" of favoring or disfavoring religion that implicates the Clause. *Ibid.*

The Order is valid under that standard. Section 2(c)'s text does not refer to or draw any distinction based on religion. And the suspension's "operation," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S.

520, 535 (1993) (*Lukumi*), confirms that it is religion-neutral: it applies to six countries based on national-security risk, and it applies to certain nationals of those countries without regard to their religion. Each of the countries had previously been identified as presenting heightened terrorism-related concerns in connection with the Visa Waiver Program. See pp. 4-5, *supra*. Section 6's refugee provisions have no connection to religion whatsoever. Both Section 6(a)'s temporary refugee suspension and Section 6(b)'s refugee cap apply to nationals of all countries worldwide.

2. The Fourth Circuit held that statements by the President—nearly all before assuming office, while still a private citizen and political candidate—and informal remarks of his aides imply that Section 2(c)'s entry suspension is intended to target Muslims. J.A. 219-223. In the court's view, those statements "are the exact type of 'readily discoverable fact[s]'" courts "use in determining a government action's primary purpose." J.A. 222 (quoting *McCreary*, 545 U.S. at 862) (brackets in original). The *Hawaii* district court enjoined Sections 2(c), 6(a), and 6(b) on substantially the same basis. J.A. 1154-1157; see J.A. 1128-1139. That reasoning is wrong.

Of course it is readily discoverable whether the campaign and other statements occurred as a matter of fact. But the relevant question is whether those statements demonstrate that the President's later action after taking office was motivated by an impermissible purpose. Resolving that question would require precisely the type of "judicial psychoanalysis" that *McCreary* forecloses. 545 U.S. at 862. Probing the President's grounds for suspending the entry of foreign nationals would thrust "ill equipped" courts into the untenable position of evaluating the "adequacy" and "authenticity" of the Executive's

reasons underlying its foreign-affairs and national-security judgments. *AAADC*, 525 U.S. at 491. And it would invite impermissible intrusion on privileged internal Executive Branch deliberations, see *United States* v. *Nixon*, 418 U.S. 683, 708 (1974), and potentially litigant-driven discovery that would disrupt the President's execution of the laws, see *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749-750 (1982). Indeed, the plaintiffs in *Washington* have indicated that they desire nearly a year of discovery, including up to 30 depositions of White House staff and Cabinet-level officials. See Joint Status Report & Discovery Plan at 5-13, *Washington* v. *Trump*, No. 17-141 (W.D. Wash. Apr. 5, 2017) (D. Ct. Doc. 177). This Court should reject a rule that invites such probing of the Chief Executive's subjective views. See *Hein* v. *Freedom From Religion Found., Inc.*, 551 U.S. 587, 616-617 (2007) (Kennedy, J., concurring).

To the government's knowledge, the Fourth Circuit's ruling is the first appellate decision to hold that a provision of federal law—neutral on its face and in its operation—violates the Establishment Clause based on speculation about its drafters' supposedly illicit purpose. Certainly this Court has never done so. *McCreary* involved a display of the Ten Commandments, 545 U.S. at 850, which are explicitly religious speech. In determining whether the display had a secular purpose despite its religious content, the Court held that the final display's "purpose * * * need[ed] to be understood in light of context," and the context of the counties' prior official actions made their objective clear. *Id.* at 874. The Court's analysis centered on the text of the county resolutions authorizing the displays, objective features of those displays, and materials that government actors deliberately made part of the official record—such as statements by

the county executive's pastor at the display's official unveiling. *Id.* at 868-874. The other cases the Fourth Circuit invoked also did not depend on anything like the campaign statements at issue here.[21]

3. Even if a court may look beyond a law's text and operation in some circumstances, it should not consider campaign-trail comments. Here, virtually all of the President's statements on which the Fourth Circuit relied were made before he assumed office, see J.A. 179-183, 219-223—before he took the prescribed oath to "preserve, protect and defend the Constitution," U.S. Const. Art. II, § 1, Cl. 8, and formed a new Administration, including Cabinet-level officials who recommended adopting the Order. Taking that oath marks a profound transition from private life to the Nation's highest public office, and manifests the singular responsibility and independent authority to protect the security and welfare of the Nation that the Constitution reposes in the President.

Moreover, "[b]ecause of their nature, campaign statements are unbounded resources by which to find intent of various kinds." J.A. 345 (Niemeyer, J., dissenting). "They are often short-hand for larger ideas" and "are explained, modified, retracted, and amplified as they are repeated and as new circumstances and arguments arise." *Ibid.* They often are made without the benefit of

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[21] In *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), it was "undisputed" that the legislature knew when it created a special school district that its boundaries were drawn specifically to include only members of one religious sect. *Id.* at 699 (opinion of Souter, J.); *id.* at 729 (Kennedy, J., concurring in the judgment) (law constituted "explicit religious gerrymandering"). Likewise, *Lukumi* held that the local ordinances' "text" and "operation" showed that they were a "religious gerrymander." 508 U.S. at 535 (citation omitted).

advice from an as-yet-unformed Administration. And they cannot bind elected officials who later conclude that a different course is warranted. See *Republican Party of Minn.* v. *White*, 536 U.S. 765, 780 (2002) ("[O]ne would be naive not to recognize that campaign promises are—by long democratic tradition—the least binding form of human commitment."); *Washington*, 858 F.3d at 1173 (Kozinski, J., dissenting).

Here, for example, the Fourth Circuit relied on statements as early as December 2015 (more than 13 months before the inauguration and 15 months before the Order) referring to immigration by "Muslims." J.A. 219 (citation omitted). But as the court noted, months later, candidate Trump advocated restrictions based on "territory," and specifically "nation[s] that ha[ve] been compromised by terrorism." J.A. 220 (citation omitted). Similarly, in remarks in June 2016, he explained his plan to "suspend immigration from areas of the world where there's a proven history of terrorism against the United States, Europe or our allies until we fully understand how to end these threats."[22] And on that and other occasions, candidate Trump stated that his focus was on combatting the threat of "radical Islamic terrorism."[23] Then, after taking the oath of office, forming an Administration, and consulting with Members of his newly formed Cabinet, the President adopted an Order that follows a territory-based approach and limits entry of nationals of six countries that sponsor or shelter terrorism. Disagreement about the meaning of prior campaign statements only highlights

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[22] Ryan Teague Beckwith, *Read Donald Trump's Speech on the Orlando Shooting*, Time.com, June 13, 2016, https://goo.gl/cSHJyD.

[23] The American Presidency Project, Donald J. Trump, *Remarks at Youngstown State University in Youngstown, Ohio* (Aug. 15, 2016), https://goo.gl/T5xRvu.

the dangers in "opening the door" to campaign comments. J.A. 346 (Niemeyer, J., dissenting).

Allowing consideration of campaign statements also "has no rational limit," raising questions about whether courts may consider "statements from a previous campaign, or from a previous business conference, or from college." J.A. 346 (Niemeyer, J., dissenting). The Fourth Circuit did not deny that its approach might permit considering an official's "college essay," asserting only that such far-removed statements would "rarely" be "reveal[ing]." J.A. 232. That ad hoc approach would mean "the policies of an elected official can be forever held hostage by the unguarded declarations of a candidate." *Washington*, 858 F.3d at 1174 (Kozinski, J., dissenting). And it would "mire [courts] in a swamp of unworkable litigation," with no principled rules governing how to assess particular past statements made before a candidate assumes office. *Id.* at 1173. That approach also threatens to "chill campaign speech," to which "our most basic free speech principles have their fullest and most urgent application." *Ibid.* (citation and internal quotation marks omitted).

All of these concerns are heightened where, as here, the statements at issue implicate issues of foreign relations. By attempting to delve into the President's supposed motives, the Fourth Circuit injected itself into sensitive matters of foreign affairs and risked "what [this] Court has called in another context 'embarrassment of our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (Scalia, J.) (quoting *Baker* v. *Carr*, 369 U.S. 186, 217, 226 (1962)). In an address earlier this year to a gathering of Middle East leaders in Saudi

Arabia, the President urged that the global fight against terrorism "is not a battle between different faiths, different sects, or different civilizations," but one "between barbaric criminals who seek to obliterate human life and decent people" of all religions who "want to protect life."[24] The President decried "the murder of innocent Muslims" by terrorist groups, and called for "tolerance and respect * * * no matter [one's] faith or ethnicity."[25] Yet the court of appeals invalidated Section 2(c) as rooted in "religious intolerance, animus, and discrimination." J.A. 171. The Fourth Circuit's pronouncement—that the President of the United States took official action based on animus toward one of the world's major religions, notwithstanding his own official statements to the contrary—plainly carries the potential to undermine the Executive's ability to conduct foreign relations for and protect the security of the Nation.

4. Excluding campaign statements from the analysis confirms that the Fourth Circuit erred. The few post-inauguration remarks it cited do not demonstrate an impermissible purpose. The court cited statements by the President and aides made between the January Order and the Order—describing the Order as pursuing "the same basic policy outcomes," reflecting the same "principles," or constituting a "watered down version" of the January Order. J.A. 221 (citations omitted). But as the Order explains, both Orders aimed at the same national-security objective: facilitating a review of existing screening and vetting procedures. J.A. 1416-1425 (§ 1(b)-(i)). The Order pursues that objective through substantially

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[24] Washington Post Staff, *President Trump's full speech from Saudi Arabia on global terrorism*, Wash. Post, May 21, 2017, https://goo.gl/viJRg2.

[25] *Ibid.*

revised provisions; the differences are clear on the Order's face.

The court of appeals also held that a passing remark by the President when signing the January Order signaled an improper motive. After reading its title—"Protecting the Nation From Foreign Terrorist Entry into the United States," J.A. 1416—he stated, "[w]e all know what that means." J.A. 221 (citation omitted). Minutes earlier, however, in the presence of the newly sworn-in Secretary of Defense, the President had said, "I am establishing new vetting measures to keep radical Islamic terrorists out of the United States of America. * * * We want to ensure that we are not admitting into our country the very threats our soldiers are fighting overseas."[26] In context, the President's passing remark is reasonably understood to refer to terrorist groups like ISIL and al Qaeda, not all Muslims. It is at least ambiguous, and the court erred in setting aside an Executive Order of the President based on an offhand, six-word comment made in connection with a prior directive.

5. Even if it was appropriate for the Fourth Circuit to consider various campaign comments, the court erred in concluding that those comments refute the Order's religion-neutral text and operation, its explicit national-security rationale, and the recommendations of members of the President's Cabinet. The stark disconnect between the campaign comments on which the Fourth Circuit relied and the actual terms of the Order—which do not relate to Islam in any way—confirm that the statements lack probative value.

At a minimum, the Fourth Circuit should have resolved any uncertainty in favor of, not against, the

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[26] Dan Merica, *Trump Signs Executive Order to Keep Out 'Radical Islamic Terrorists,'* CNN.com (Jan. 30, 2017), https://goo.gl/dMZEvO.

Arabia, the President urged that the global fight against terrorism "is not a battle between different faiths, different sects, or different civilizations," but one "between barbaric criminals who seek to obliterate human life and decent people" of all religions who "want to protect life."[24] The President decried "the murder of innocent Muslims" by terrorist groups, and called for "tolerance and respect * * * no matter [one's] faith or ethnicity."[25] Yet the court of appeals invalidated Section 2(c) as rooted in "religious intolerance, animus, and discrimination." J.A. 171. The Fourth Circuit's pronouncement—that the President of the United States took official action based on animus toward one of the world's major religions, notwithstanding his own official statements to the contrary—plainly carries the potential to undermine the Executive's ability to conduct foreign relations for and protect the security of the Nation.

4. Excluding campaign statements from the analysis confirms that the Fourth Circuit erred. The few post-inauguration remarks it cited do not demonstrate an impermissible purpose. The court cited statements by the President and aides made between the January Order and the Order—describing the Order as pursuing "the same basic policy outcomes," reflecting the same "principles," or constituting a "watered down version" of the January Order. J.A. 221 (citations omitted). But as the Order explains, both Orders aimed at the same national-security objective: facilitating a review of existing screening and vetting procedures. J.A. 1416-1425 (§ 1(b)-(i)). The Order pursues that objective through substantially

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[24] Washington Post Staff, *President Trump's full speech from Saudi Arabia on global terrorism*, Wash. Post, May 21, 2017, https://goo.gl/viJRg2.

[25] *Ibid.*

revised provisions; the differences are clear on the Order's face.

The court of appeals also held that a passing remark by the President when signing the January Order signaled an improper motive. After reading its title—"Protecting the Nation From Foreign Terrorist Entry into the United States," J.A. 1416—he stated, "[w]e all know what that means." J.A. 221 (citation omitted). Minutes earlier, however, in the presence of the newly sworn-in Secretary of Defense, the President had said, "I am establishing new vetting measures to keep radical Islamic terrorists out of the United States of America. * * * We want to ensure that we are not admitting into our country the very threats our soldiers are fighting overseas."[26] In context, the President's passing remark is reasonably understood to refer to terrorist groups like ISIL and al Qaeda, not all Muslims. It is at least ambiguous, and the court erred in setting aside an Executive Order of the President based on an offhand, six-word comment made in connection with a prior directive.

5. Even if it was appropriate for the Fourth Circuit to consider various campaign comments, the court erred in concluding that those comments refute the Order's religion-neutral text and operation, its explicit national-security rationale, and the recommendations of members of the President's Cabinet. The stark disconnect between the campaign comments on which the Fourth Circuit relied and the actual terms of the Order—which do not relate to Islam in any way—confirm that the statements lack probative value.

At a minimum, the Fourth Circuit should have resolved any uncertainty in favor of, not against, the

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[26] Dan Merica, *Trump Signs Executive Order to Keep Out 'Radical Islamic Terrorists,'* CNN.com (Jan. 30, 2017), https://goo.gl/dMZEvO.

Order's validity. The "presumption of regularity" that attaches to all federal officials' actions, *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14 (1926), carries the utmost force with respect to the President himself. The presumption, which is magnified here by respect for the head of a coordinate Branch, counsels crediting the Order's stated national-security purpose absent the clearest showing to the contrary. In light of these principles, the Fourth Circuit erred in refusing to credit the Order's stated objective of combatting terrorism and instead determining that it is based on animosity towards Islam or Muslims generally.

V. THE GLOBAL INJUNCTIONS ARE OVERBROAD

A. The courts of appeals further erred in upholding global preliminary injunctions that categorically bar enforcement of a national-security directive of the President without any finding (or basis for finding) that such sweeping relief is necessary to redress cognizable injuries to respondents themselves.

1. Both constitutional and equitable principles require that injunctive relief be limited to redressing a plaintiff's own cognizable injuries. Article III requires that "a plaintiff must demonstrate standing * * * for each form of relief that is sought." *Town of Chester* v. *Laroe Estates, Inc.*, No. 16-605 (June 5, 2017), slip op. 5 (citation omitted). "The remedy" sought therefore must "be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis* v. *Casey*, 518 U.S. 343, 357 (1996). "The actual-injury requirement would hardly serve [its] purpose * * * of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administra-

tion, the court were authorized to remedy *all* inadequacies in that administration." *Ibid.*; see *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983). Equitable principles independently require that injunctions "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted).

2. In *IRAP*, the Fourth Circuit upheld a global injunction against Section 2(c) based on two purported injuries to a *single* respondent, Doe #1: the putative delay in "his wife's entry into the United States," and an alleged "state-sanctioned message condemning his religion." J.A. 196; see J.A. 203-204. Even before his wife received a visa, an injunction limited to Doe #1's wife would have fully redressed the former alleged injury. Now that she has received a visa, that purported injury has evaporated. *IRAP*, 137 S. Ct. at 2086 n.*.

That leaves only Doe #1's alleged "message" injury. The Fourth Circuit reasoned that, because Section 2(c) supposedly sends a message of condemnation to Muslims, the provision had to be enjoined worldwide—lest any application communicate that message to Doe #1. J.A. 199-200. The court's reasoning places in stark relief how respondents' message theory would eviscerate limitations on standing *and* equitable relief. By recharacterizing Section 2(c) as government speech directed at U.S. citizens, rather than government conduct directed at aliens abroad, any U.S. citizen apparently could obtain a global injunction against Section 2(c)—or any other allegedly discriminatory immigration law—to silence the supposed message.

The Fourth Circuit attempted to draw back from that radical holding. It disclaimed that "all Muslims in

the United States" could sue, and it deemed Doe #1's claim justiciable based on the combination of Section 2(c)'s purported message and its then-hypothetical (now-nonexistent) effect on his wife. J.A. 202-203 n.11. But combining two different asserted injuries, neither of which justifies global relief, does not change the analysis. Any delay in the entry of Doe #1's wife could have been redressed by an injunction limited to her. See *Lewis*, 518 U.S. at 357. Only Doe #1's condemnation injury could possibly have been the basis for expanding the injunction. And if that is sufficient to ground global relief, there is no reason why a plaintiff also would need to allege an effect on a family member. Under the Fourth Circuit's reasoning, all Muslims in the United States *can* sue—along with potentially all non-Muslims who are equally offended by Section 2(c)'s alleged message.

3. In *Hawaii*, the Ninth Circuit upheld the injunction against Sections 2(c), 6(a), and 6(b) based on injuries to Dr. Elshikh and Hawaii, J.A. 1180-1187, 1223-1224, but those purported injuries likewise cannot justify the global relief imposed.

a. The court of appeals held that Dr. Elshikh would suffer irreparable harm based solely on the alleged delay in his mother-in-law's entry. J.A. 1223-1224; see J.A. 1180-1182. But as with Doe #1's wife, any harm to Dr. Elshikh's mother-in-law was redressable by an injunction limited to her—an injunction that is now unnecessary because she has received a visa. The district court also relied on Dr. Elshikh's asserted "message" injury. For the reasons given above, that injury cannot justify enjoining application of Section 2(c) as to any person worldwide. It also cannot plausibly support

enjoining Section 6(a) and (b), which apply to refugees from every country worldwide.

In addition, even if this Court were to hold (as the Ninth Circuit did) that Sections 2(c), 6(a), and 6(b) are unlawful on the ground that they violate the INA, Dr. Elshikh's claimed "message" injury could not support any injunction as to those provisions. That purported harm flows from the Order's alleged violation of the Establishment Clause; it has nothing to do with the Order's compliance with federal immigration statutes. An injunction cannot be upheld on the basis that a plaintiff is likely to succeed on the merits of one legal theory (*i.e.*, the Order violates the INA), but has suffered irreparable injury based on another legal theory (*i.e.*, the Order violates the Establishment Clause by sending an exclusionary message).

b. The court of appeals also held that Hawaii would suffer irreparable harm based on alleged "constraints to recruiting and attracting students and faculty members to the University of Hawai'i, decreased tuition revenue," and its claimed "inability to assist in refugee resettlement." J.A. 1223. Even if those interests constitute cognizable injuries, but see p. 34, *supra*, they cannot plausibly justify enjoining Sections 2(c), 6(a), and 6(b) worldwide. Any injuries to Hawaii's university system, for example, could be fully redressed by an injunction tailored to particular, identified students or faculty whom Hawaii has enrolled or hired.

Likewise, even if Hawaii could claim a cognizable stake in providing assistance to refugees after their arrival, at most that might warrant enjoining the Order as to specific refugees who have been determined to meet the requirements for refugee admission and who have concrete plans to resettle in Hawaii. As the court

of appeals noted, Hawaii has resettled only approximately 20 refugees in the past seven years and only three in the current fiscal year. J.A. 1232. Redressing Hawaii's interest in resettling a handful of refugees by enjoining Section 6(a) and (b) as to *thousands* of refugees with no connection to the State is a drastic overextension of equity.

B. None of the other justifications the courts of appeals gave for global injunctive relief withstands scrutiny. Both courts stated that categorical relief was necessary because a more limited injunction would not cure the alleged legal defects in the Order, and the enjoined provisions' application to nonparties would be equally unlawful. J.A. 244, 1234. That conflates the scope of respondents' legal theory (*i.e.*, that the enjoined provisions are invalid on their face) with the scope of relief they personally may obtain. Regardless of the nature of respondents' legal challenge, they may not obtain relief beyond what it is necessary to redress their own cognizable injuries. The Fourth Circuit also noted that the *IRAP* respondents "are dispersed throughout the United States," apparently referring to the refugee organizations' clients. J.A. 244. But it did not hold that any respondent besides Doe #1 had standing—and even his claimed injury has been eliminated.

Both courts of appeals also concluded that categorical relief is appropriate because "Congress has made clear that 'the immigration laws of the United States should be enforced vigorously and uniformly.'" J.A. 244 (emphasis omitted) (quoting *Texas* v. *United States*, 809 F.3d 134, 187-188 (5th Cir. 2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016)); J.A. 1233 (same). The courts' preference for uniform enforcement is a

curious rationale for barring *any* enforcement of Sections 2(c), 6(a), and 6(b) based on injury to at most a handful of individuals. Proper respect for uniform enforcement and for a coordinate branch compel leaving those provisions in place, with individualized exceptions for particular plaintiffs who demonstrate cognizable, irreparable harm.

The Order's express severability clause compels the same approach. Section 15(a) of the Order provides that, if "the application of any provision to any person or circumstance[] is held to be invalid," then "the application of [the Order's] other provisions to any other persons or circumstances shall not be affected." J.A. 1439. Once the courts of appeals concluded that the application of Section 2(c), 6(a), or 6(b) was invalid as to any person, the Order's express terms required severing that application. Such tailored relief would have posed far less interference with federal policy than enjoining the President's directive wholesale based on alleged injuries to a few respondents.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. 6 U.S.C. 236 provides in pertinent part:

Visa issuance

* * * * *

(b) In general

Notwithstanding section 104(a) of the Immigration and Nationality Act (8 U.S.C. 1104(a)) or any other provision of law, and except as provided in subsection (c) of this section, the Secretary—

(1) shall be vested exclusively with all authorities to issue regulations with respect to, administer, and enforce the provisions of such Act [8 U.S.C. 1101 et seq.], and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas, and shall have the authority to refuse visas in accordance with law and to develop programs of homeland security training for consular officers (in addition to consular training provided by the Secretary of State), which authorities shall be exercised through the Secretary of State, except that the Secretary shall not have authority to alter

or reverse the decision of a consular officer to refuse a visa to an alien; and

(2) shall have authority to confer or impose upon any officer or employee of the United States, with the consent of the head of the executive agency under whose jurisdiction such officer or employee is serving, any of the functions specified in paragraph (1).

(c) Authority of the Secretary of State

(1) In general

Notwithstanding subsection (b) of this section, the Secretary of State may direct a consular officer to refuse a visa to an alien if the Secretary of State deems such refusal necessary or advisable in the foreign policy or security interests of the United States.

* * * * *

(f) No creation of private right of action

Nothing in this section shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa.

* * * * *

3. 8 U.S.C. 1152(a) provides:

Numerical limitations on individual foreign states

(a) Per country level

(1) Nondiscrimination

(A) Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

(B) Nothing in this paragraph shall be construed to limit the authority of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.

(2) Per country levels for family-sponsored and employment-based immigrants

Subject to paragraphs (3), (4), and (5), the total number of immigrant visas made available to natives of any single foreign state or dependent area under subsections (a) and (b) of section 1153 of this title in any fiscal year may not exceed 7 percent (in the case of a single foreign state) or 2 percent (in the case of a dependent area) of the total number of such visas made available under such subsections in that fiscal year.

(3) Exception if additional visas available

If because of the application of paragraph (2) with respect to one or more foreign states or depend-

ent areas, the total number of visas available under both subsections (a) and (b) of section 1153 of this title for a calendar quarter exceeds the number of qualified immigrants who otherwise may be issued such a visa, paragraph (2) shall not apply to visas made available to such states or areas during the remainder of such calendar quarter.

(4) Special rules for spouses and children of lawful permanent resident aliens

(A) 75 percent of 2nd preference set-aside for spouses and children not subject to per country limitation

(i) In general

Of the visa numbers made available under section 1153(a) of this title to immigrants described in section 1153(a)(2)(A) of this title in any fiscal year, 75 percent of the 2-A floor (as defined in clause (ii)) shall be issued without regard to the numerical limitation under paragraph (2).

(ii) "2-A floor" defined

In this paragraph, the term "2-A floor" means, for a fiscal year, 77 percent of the total number of visas made available under section 1153(a) of this title to immigrants described in section 1153(a)(2) of this title in the fiscal year.

(B) Treatment of remaining 25 percent for countries subject to subsection (e)

(i) In general

Of the visa numbers made available under section 1153(a) of this title to immigrants described in section 1153(a)(2)(A) of this title in any fiscal year, the remaining 25 percent of the 2-A floor shall be available in the case of a state or area that is subject to subsection (e) only to the extent that the total number of visas issued in accordance with subparagraph (A) to natives of the foreign state or area is less than the subsection (e) ceiling (as defined in clause (ii)).

(ii) "Subsection (e) ceiling" defined

In clause (i), the term "subsection (e) ceiling" means, for a foreign state or dependent area, 77 percent of the maximum number of visas that may be made available under section 1153(a) of this title to immigrants who are natives of the state or area under section 1153(a)(2) of this title consistent with subsection (e).

(C) Treatment of unmarried sons and daughters in countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, the number of immigrant visas that may be made available to natives of the state or area under section 1153(a)(2)(B) of this title may not exceed—

(i) 23 percent of the maximum number of visas that may be made available under section 1153(a) of this title to immigrants of the state or area described in section 1153(a)(2) of this title consistent with subsection (e), or

(ii) the number (if any) by which the maximum number of visas that may be made available under section 1153(a) of this title to immigrants of the state or area described in section 1153(a)(2) of this title consistent with subsection (e) exceeds the number of visas issued under section 1153(a)(2)(A) of this title,

whichever is greater.

(D) Limiting pass down for certain countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 1153(a)(2) of this title exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 1153(a)(2) of this title consistent with subsection (e) (determined without regard to this paragraph), in applying paragraphs (3) and (4) of section 1153(a) of this title under subsection (e)(2) all visas shall be deemed to have been required for the classes specified in paragraphs (1) and (2) of such section.

(5) Rules for employment-based immigrants

(A) Employment-based immigrants not subject to per country limitation if additional visas available

If the total number of visas available under paragraph (1), (2), (3), (4), or (5) of section 1153(b) of this title for a calendar quarter exceeds the number of qualified immigrants who may otherwise be issued such visas, the visas made available under that paragraph shall be issued without regard to the numerical limitation under paragraph (2) of this subsection during the remainder of the calendar quarter.

(B) Limiting fall across for certain countries subject to subsection (e)

In the case of a foreign state or dependent area to which subsection (e) applies, if the total number of visas issued under section 1153(b) of this title exceeds the maximum number of visas that may be made available to immigrants of the state or area under section 1153(b) of this title consistent with subsection (e) (determined without regard to this paragraph), in applying subsection (e) all visas shall be deemed to have been required for the classes of aliens specified in section 1153(b) of this title.

4. 8 U.S.C. 1157 provides:

Annual admission of refugees and admission of emergency situation refugees

(a) Maximum number of admissions; increases for humanitarian concerns; allocations

(1) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e) of this section), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

(4) In the determination made under this subsection for each fiscal year (beginning with fiscal year 1992), the President shall enumerate, with the respective number of refugees so determined, the number of aliens who were granted asylum in the previous year.

(b) Determinations by President respecting number of admissions for humanitarian concerns

If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a) of this section, the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status of alien, spouse or child

(1) Subject to the numerical limitations established pursuant to subsections (a) and (b) of this section, the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter.

(2)(A) A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 1101(a)(42) of this title, be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

(B) An unmarried alien who seeks to accompany, or follow to join, a parent granted admission as a refugee under this subsection, and who was under 21 years of age on the date on which such parent applied for refugee status under this section, shall continue to be classified as a child for purposes of this paragraph, if the alien attained 21 years of age after such application was filed but while it was pending.

(3) The provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraph (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be

granted only on an individual basis following an investigation. The Attorney General shall provide for the annual reporting to Congress of the number of waivers granted under this paragraph in the previous fiscal year and a summary of the reasons for granting such waivers.

(4) The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) of this title at the time of the alien's admission.

(d) Oversight reporting and consultation requirements

(1) Before the start of each fiscal year the President shall report to the Committees on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) of this section or with respect to the admission of refugees in response to an emergency refugee situation

under subsection (b) of this section, the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3)(A) After the President initiates appropriate consultation prior to making a determination under subsection (a) of this section, a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b) of this section, that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(e) "Appropriate consultation" defined

For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian

concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

(f) Training

(1) The Attorney General, in consultation with the Secretary of State, shall provide all United States officials adjudicating refugee cases under this section with the same training as that provided to officers adjudicating asylum cases under section 1158 of this title.

(2) Such training shall include country-specific conditions, instruction on the internationally recognized right to freedom of religion, instruction on methods of religious persecution practiced in foreign countries, and applicable distinctions within a country between the nature of and treatment of various religious practices and believers.

5. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds

(A) In general

Any alien—

(i) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a com-

municable disease of public health significance;[1]

(ii) except as provided in subparagraph (C), who seeks admission as an immigrant, or who seeks adjustment of status to the status of an alien lawfully admitted for permanent residence, and who has failed to present documentation of having received vaccination against vaccine-preventable diseases, which shall include at least the following diseases: mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, influenza type B and hepatitis B, and any other vaccinations against vaccine-preventable diseases recommended by the Advisory Committee for Immunization Practices,

(iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the Attorney General)—

(I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or

(II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is

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[1] So in original. The semicolon probably should be a comma.

likely to recur or to lead to other harmful behavior, or

(iv) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to be a drug abuser or addict,

is inadmissible.

(B) Waiver authorized

For provision authorizing waiver of certain clauses of subparagraph (A), see subsection (g) of this section.

(C) Exception from immunization requirement for adopted children 10 years of age or younger

Clause (ii) of subparagraph (A) shall not apply to a child who—

(i) is 10 years of age or younger,

(ii) is described in subparagraph (F) or (G) of section 1101(b)(1) of this title:[1] and

(iii) is seeking an immigrant visa as an immediate relative under section 1151(b) of this title,

if, prior to the admission of the child, an adoptive parent or prospective adoptive parent of the child, who has sponsored the child for admission as an immediate relative, has executed an affidavit stating that the parent is aware of the provisions of subparagraph (A)(ii) and will ensure that, within 30 days of the child's admission, or at the

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[1] So in original. The semicolon probably should be a comma.

earliest time that is medically appropriate, the child will receive the vaccinations identified in such subparagraph.

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

(ii) Exception

Clause (i)(I) shall not apply to an alien who committed only one crime if—

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documen-

tation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) Controlled substance traffickers

Any alien who the consular officer or the Attorney General knows or has reason to believe—

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed

substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity,

is inadmissible.

(D) Prostitution and commercialized vice

Any alien who—

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10-year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution,

is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution

Any alien—

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 1101(h) of this title),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense,

is inadmissible.

(F) Waiver authorized

For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h) of this section.

(G) Foreign government officials who have committed particularly severe violations of religious freedom

Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 6402 of title 22, is inadmissible.

(H) Significant traffickers in persons

(i) In general

Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States, or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 7102 of title 22, is inadmissible.

(ii) Beneficiaries of trafficking

Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) Exception for certain sons and daughters

Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) Money laundering

Any alien—

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18 (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section;

is inadmissible.

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in—

(i) any activity (I) to violate any law of the United States relating to espionage or sabotage or (II) to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other unlawful activity, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of,

the Government of the United States by force, violence, or other unlawful means,

is inadmissible.

(B) Terrorist activities

(i) In general

Any alien who—

(I) has engaged in a terrorist activity;

(II) a consular officer, the Attorney General, or the Secretary of Homeland Security knows, or has reasonable ground to believe, is engaged in or is likely to engage after entry in any terrorist activity (as defined in clause (iv));

(III) has, under circumstances indicating an intention to cause death or serious bodily harm, incited terrorist activity;

(IV) is a representative (as defined in clause (v)) of—

(aa) a terrorist organization (as defined in clause (vi)); or

(bb) a political, social, or other group that endorses or espouses terrorist activity;

(V) is a member of a terrorist organization described in subclause (I) or (II) of clause (vi);

(VI) is a member of a terrorist organization described in clause (vi)(III), unless the alien can demonstrate by clear and convincing evidence that the alien did not know, and

should not reasonably have known, that the organization was a terrorist organization;

(VII) endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization;

(VIII) has received military-type training (as defined in section 2339D(c)(1) of title 18) from or on behalf of any organization that, at the time the training was received, was a terrorist organization (as defined in clause (vi)); or

(IX) is the spouse or child of an alien who is inadmissible under this subparagraph, if the activity causing the alien to be found inadmissible occurred within the last 5 years,

is inadmissible. An alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organization is considered, for purposes of this chapter, to be engaged in a terrorist activity.

(ii) Exception

Subclause (IX) of clause (i) does not apply to a spouse or child—

(I) who did not know or should not reasonably have known of the activity causing the alien to be found inadmissible under this section; or

(II) whom the consular officer or Attorney General has reasonable grounds to believe

has renounced the activity causing the alien to be found inadmissible under this section.

(iii) "Terrorist activity" defined

As used in this chapter, the term "terrorist activity" means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

(iv) "Engage in terrorist activity" defined

As used in this chapter, the term "engage in terrorist activity" means, in an individual capacity or as a member of an organization—

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for—

(aa) a terrorist activity;

(bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should

not reasonably have known, that the organization was a terrorist organization;

(V) to solicit any individual—

(aa) to engage in conduct otherwise described in this subsection;

(bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or

(cc) for membership in a terrorist organization described in clause (vi)(III) unless the solicitor can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

(v) "Representative" defined

As used in this paragraph, the term "representative" includes an officer, official, or spokesman of an organization, and any person who directs, counsels, commands, or induces an organization or its members to engage in terrorist activity.

(vi) "Terrorist organization" defined

As used in this section, the term "terrorist organization" means an organization—

(I) designated under section 1189 of this title;

(II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or

(III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).

(C) Foreign policy

(i) In general

An alien whose entry or proposed activities in the United States the Secretary of State "has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.

(ii) Exception for officials

An alien who is an official of a foreign government or a purported government, or who is a candidate for election to a foreign government office during the period immediately preceding the election for that office, shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) solely because of the alien's past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States.

(iii) Exception for other aliens

An alien, not described in clause (ii), shall not be excludable or subject to restrictions or conditions on entry into the United States under clause (i) because of the alien's past, current, or expected beliefs, statements, or associa-

tions, if such beliefs, statements, or associations would be lawful within the United States, unless the Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest.

(iv) Notification of determinations

If a determination is made under clause (iii) with respect to an alien, the Secretary of State must notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identity of the alien and the reasons for the determination.

(D) Immigrant membership in totalitarian party

(i) In general

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

(ii) Exception for involuntary membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that the membership or affiliation is or was involuntary, or is or was solely when under 16 years of age, by operation of law, or for purposes of obtaining employment, food

rations, or other essentials of living and whether necessary for such purposes.

(iii) Exception for past membership

Clause (i) shall not apply to an alien because of membership or affiliation if the alien establishes to the satisfaction of the consular officer when applying for a visa (or to the satisfaction of the Attorney General when applying for admission) that—

(I) the membership or affiliation terminated at least—

(a) 2 years before the date of such application, or

(b) 5 years before the date of such application, in the case of an alien whose membership or affiliation was with the party controlling the government of a foreign state that is a totalitarian dictatorship as of such date, and

(II) the alien is not a threat to the security of the United States.

(iv) Exception for close family members

The Attorney General may, in the Attorney General's discretion, waive the application of clause (i) in the case of an immigrant who is the parent, spouse, son, daughter, brother, or sister of a citizen of the United States or a spouse, son, or daughter of an alien lawfully admitted for permanent residence for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest if the

immigrant is not a threat to the security of the United States.

(E) Participants in Nazi persecution, genocide, or the commission of any act of torture or extra-judicial killing

(i) Participation in Nazi persecutions

Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(I) the Nazi government of Germany,

(II) any government in any area occupied by the military forces of the Nazi government of Germany,

(III) any government established with the assistance or cooperation of the Nazi government of Germany, or

(IV) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion is inadmissible.

(ii) Participation in genocide

Any alien who ordered, incited, assisted, or otherwise participated in genocide, as defined in section 1091(a) of title 18, is inadmissible.

(iii) Commission of acts of torture or extrajudicial killings

Any alien who, outside the United States, has committed, ordered, incited, assisted, or otherwise participated in the commission of—

(I) any act of torture, as defined in section 2340 of title 18; or

(II) under color of law of any foreign nation, any extrajudicial killing, as defined in section 3(a) of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note),

is inadmissible.

(F) Association with terrorist organizations

Any alien who the Secretary of State, after consultation with the Attorney General, or the Attorney General, after consultation with the Secretary of State, determines has been associated with a terrorist organization and intends while in the United States to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States is inadmissible.

(G) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of title 18 is inadmissible.

* * * * *

(7) Documentation requirements

(A) Immigrants

(i) In general

Except as otherwise specifically provided in this chapter, any immigrant at the time of application for admission—

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 1181(a) of this title, or

(II) whose visa has been issued without compliance with the provisions of section

is inadmissible.

(ii) Waiver authorized

For provision authorizing waiver of clause (i), see subsection (k) of this section.

(B) Nonimmigrants

(i) In general

Any nonimmigrant who—

(I) is not in possession of a passport valid for a minimum of six months from the date of the expiration of the initial period of the alien's admission or contemplated initial

period of stay authorizing the alien to return to the country from which the alien came or to proceed to and enter some other country during such period, or

(II) is not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission,

is inadmissible.

(ii) General waiver authorized

For provision authorizing waiver of clause (i), see subsection (d)(4) of this section.

(iii) Guam and Northern Mariana Islands visa waiver

For provision authorizing waiver of clause (i) in the case of visitors to Guam or the Commonwealth of the Northern Mariana Islands, see subsection (*l*).

(iv) Visa waiver program

For authority to waive the requirement of clause (i) under a program, see section 1187 of this title.

* * * * *

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as

he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate. Whenever the Attorney General finds that a commercial airline has failed to comply with regulations of the Attorney General relating to requirements of airlines for the detection of fraudulent documents used by passengers traveling to the United States (including the training of personnel in such detection), the Attorney General may suspend the entry of some or all aliens transported to the United States by such airline.

* * * * *

6. 8 U.S.C. 1185(a) provides:

Travel control of citizens and aliens

(a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

7. 8 U.S.C. 1187 (2012 & Supp. III 2015) provides:

Visa waiver program for certain visitors

(a) Establishment of program

The Secretary of Homeland Security and the Secretary of State are authorized to establish a program (hereinafter in this section referred to as the "pro-

gram") under which the requirement of paragraph (7)(B)(i)(II) of section 1182(a) of this title may be waived by the Secretary of Homeland Security, in consultation with the Secretary of State and in accordance with this section, in the case of an alien who meets the following requirements:

(1) Seeking entry as tourist for 90 days or less

The alien is applying for admission during the program as a nonimmigrant visitor (described in section 1101(a)(15)(B) of this title) for a period not exceeding 90 days.

(2) National of program country

The alien is a national of, and presents a passport issued by, a country which—

(A) extends (or agrees to extend), either on its own or in conjunction with one or more other countries that are described in subparagraph (B) and that have established with it a common area for immigration admissions, reciprocal privileges to citizens and nationals of the United States, and

(B) is designated as a pilot program country under subsection (c) of this section.

(3) Passport requirements

The alien, at the time of application for admission, is in possession of a valid unexpired passport that satisfies the following:

(A) Machine readable

The passport is a machine-readable passport that is tamper-resistant, incorporates document authentication identifiers, and otherwise satisfies

the internationally accepted standard for machine readability.

(B) Electronic

Beginning on April 1, 2016, the passport is an electronic passport that is fraud-resistant, contains relevant biographic and biometric information (as determined by the Secretary of Homeland Security), and otherwise satisfies internationally accepted standards for electronic passports.

(4) Executes immigration forms

The alien before the time of such admission completes such immigration form as the Secretary of Homeland Security shall establish.

(5) Entry into the United States

If arriving by sea or air, the alien arrives at the port of entry into the United States on a carrier, including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations[1] which has entered into an agreement with the Secretary of Homeland Security pursuant to subsection (e). The Secretary of Homeland Security is authorized to require a carrier conducting operations under part 135 of title 14, Code of Federal Regulations, or a domestic corporation conducting operations under part 91 of that title, to give suitable and proper bond, in such reasonable amount and containing such conditions as the Secretary of Home-

[1] So in original. Probably should be followed by a comma.

land Security may deem sufficient to ensure compliance with the indemnification requirements of this section, as a term of such an agreement.

(6) Not a safety threat

The alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.

(7) No previous violation

If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

(8) Round-trip ticket

The alien is in possession of a round-trip transportation ticket (unless this requirement is waived by the Secretary of Homeland Security under regulations or the alien is arriving at the port of entry on an aircraft operated under part 135 of title 14, Code of Federal Regulations, or a noncommercial aircraft that is owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations).

(9) Automated system check

The identity of the alien has been checked using an automated electronic database containing information about the inadmissibility of aliens to uncover any grounds on which the alien may be inadmissible to the United States, and no such ground has been found.

(10) Electronic transmission of identification information

Operators of aircraft under part 135 of title 14, Code of Federal Regulations, or operators of non-commercial aircraft that are owned or operated by a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations, carrying any alien passenger who will apply for admission under this section shall furnish such information as the Secretary of Homeland Security by regulation shall prescribe as necessary for the identification of any alien passenger being transported and for the enforcement of the immigration laws. Such information shall be electronically transmitted not less than one hour prior to arrival at the port of entry for purposes of checking for inadmissibility using the automated electronic database.

(11) Eligibility determination under the electronic system for travel authorization

Beginning on the date on which the electronic system for travel authorization developed under subsection (h)(3) is fully operational, each alien traveling under the program shall, before applying for admission to the United States, electronically provide to the system biographical information and such other information as the Secretary of Homeland Security shall determine necessary to determine the eligibility of, and whether there exists a law enforcement or security risk in permitting, the alien to travel to the United States. Upon review of such biographical information, the Secretary of Homeland Security shall determine whether the alien is eligible to travel to the United States under the program.

(12) Not present in Iraq, Syria, or any other country or area of concern

(A) In general

Except as provided in subparagraphs (B) and (C)—

(i) the alien has not been present, at any time on or after March 1, 2011—

(I) in Iraq or Syria;

(II) in a country that is designated by the Secretary of State under section 4605(j) of title 50 (as continued in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), section 2780 of title 22, section 2371 of title 22, or any other provision of law, as a country, the government of which has repeatedly provided support of acts of international terrorism; or

(III) in any other country or area of concern designated by the Secretary of Homeland Security under subparagraph (D); and

(ii) regardless of whether the alien is a national of a program country, the alien is not a national of—

(I) Iraq or Syria;

(II) a country that is designated, at the time the alien applies for admission, by the Secretary of State under section 4605(j) of title 50 (as continued in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)), section 2780 of title

22, section 2371 of title 22, or any other provision of law, as a country, the government of which has repeatedly provided support of acts of international terrorism; or

(III) any other country that is designated, at the time the alien applies for admission, by the Secretary of Homeland Security under subparagraph (D).

(B) Certain military personnel and government employees

Subparagraph (A)(i) shall not apply in the case of an alien if the Secretary of Homeland Security determines that the alien was present—

(i) in order to perform military service in the armed forces of a program country; or

(ii) in order to carry out official duties as a full time employee of the government of a program country.

(C) Waiver

The Secretary of Homeland Security may waive the application of subparagraph (A) to an alien if the Secretary determines that such a waiver is in the law enforcement or national security interests of the United States.

(D) Countries or areas of concern

(i) In general

Not later than 60 days after December 18, 2015, the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall

determine whether the requirement under subparagraph (A) shall apply to any other country or area.

(ii) Criteria

In making a determination under clause (i), the Secretary shall consider—

(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States;

(II) whether a foreign terrorist organization has a significant presence in the country or area; and

(III) whether the country or area is a safe haven for terrorists.

(iii) Annual review

The Secretary shall conduct a review, on an annual basis, of any determination made under clause (i).

(E) Report

Beginning not later than one year after December 18, 2015, and annually thereafter, the Secretary of Homeland Security shall submit to the Committee on Homeland Security, the Committee on Foreign Affairs, the Permanent Select Committee on Intelligence, and the Committee on the Judiciary of the House of Representatives, and the Committee on Homeland Security and Governmental Affairs, the Committee on Foreign Relations, the Select Committee on Intelligence,

and the Committee on the Judiciary of the Senate a report on each instance in which the Secretary exercised the waiver authority under subparagraph (C) during the previous year.

(b) Waiver of rights

An alien may not be provided a waiver under the program unless the alien has waived any right—

(1) to review or appeal under this chapter of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States, or

(2) to contest, other than on the basis of an application for asylum, any action for removal of the alien.

(c) Designation of program countries

(1) In general

The Secretary of Homeland Security, in consultation with the Secretary of State, may designate any country as a program country if it meets the requirements of paragraph (2).

(2) Qualifications

Except as provided in subsection (f), a country may not be designated as a program country unless the following requirements are met:

(A) Low nonimmigrant visa refusal rate

Either—

(i) the average number of refusals of nonimmigrant visitor visas for nationals of that country during—

(I) the two previous full fiscal years was less than 2.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years; and

(II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year; or

(ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent.

(B) Passport program

(i) Issuance of passports

The government of the country certifies that it issues to its citizens passports described in subparagraph (A) of subsection (a)(3), and on or after April 1, 2016, passports described in subparagraph (B) of subsection (a)(3).

(ii) Validation of passports

Not later than October 1, 2016, the government of the country certifies that it has in place mechanisms to validate passports described in subparagraphs (A) and (B) of subsection (a)(3) at each key port of entry into that country. This requirement shall not apply to travel between countries which fall within the Schengen Zone.

(C) Law enforcement and security interests

The Secretary of Homeland Security, in consultation with the Secretary of State—

(i) evaluates the effect that the country's designation would have on the law enforcement and security interests of the United States (including the interest in enforcement of the immigration laws of the United States and the existence and effectiveness of its agreements and procedures for extraditing to the United States individuals, including its own nationals, who commit crimes that violate United States law);

(ii) determines that such interests would not be compromised by the designation of the country; and

(iii) submits a written report to the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Homeland Security of the House of Representatives and the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Homeland Security and Governmental Affairs of the Senate regarding the country's qualification for designation that includes an explanation of such determination.

(D) Reporting lost and stolen passports

The government of the country enters into an agreement with the United States to report, or make available through Interpol or other means as designated by the Secretary of Homeland Security, to the United States Government infor-

mation about the theft or loss of passports not later than 24 hours after becoming aware of the theft or loss and in a manner specified in the agreement.

(E) Repatriation of aliens

The government of the country accepts for repatriation any citizen, former citizen, or national of the country against whom a final executable order of removal is issued not later than three weeks after the issuance of the final order of removal. Nothing in this subparagraph creates any duty for the United States or any right for any alien with respect to removal or release. Nothing in this subparagraph gives rise to any cause of action or claim under this paragraph or any other law against any official of the United States or of any State to compel the release, removal, or consideration for release or removal of any alien.

(F) Passenger information exchange

The government of the country enters into an agreement with the United States to share information regarding whether citizens and nationals of that country traveling to the United States represent a threat to the security or welfare of the United States or its citizens, and fully implements such agreement.

(G) Interpol screening

Not later than 270 days after December 18, 2015, except in the case of a country in which there is not an international airport, the government of the country certifies to the Secretary of

Homeland Security that, to the maximum extent allowed under the laws of the country, it is screening, for unlawful activity, each person who is not a citizen or national of that country who is admitted to or departs that country, by using relevant databases and notices maintained by Interpol, or other means designated by the Secretary of Homeland Security. This requirement shall not apply to travel between countries which fall within the Schengen Zone.

(3) Continuing and subsequent qualifications

For each fiscal year after the initial period—

(A) Continuing qualification

In the case of a country which was a program country in the previous fiscal year, a country may not be designated as a program country unless the sum of—

(i) the total of the number of nationals of that country who were denied admission at the time of arrival or withdrew their application for admission during such previous fiscal year as a nonimmigrant visitor, and

(ii) the total number of nationals of that country who were admitted as nonimmigrant visitors during such previous fiscal year and who violated the terms of such admission,

was less than 2 percent of the total number of nationals of that country who applied for admission as nonimmigrant visitors during such previous fiscal year.

(B) New countries

In the case of another country, the country may not be designated as a program country unless the following requirements are met:

(i) Low nonimmigrant visa refusal rate in previous 2-year period

The average number of refusals of nonimmigrant visitor visas for nationals of that country during the two previous full fiscal years was less than 2 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during those years.

(ii) Low nonimmigrant visa refusal rate in each of the 2 previous years

The average number of refusals of nonimmigrant visitor visas for nationals of that country during either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year.

(4) Initial period

For purposes of paragraphs (2) and (3), the term "initial period" means the period beginning at the end of the 30-day period described in subsection (b)(1) of this section and ending on the last day of the first fiscal year which begins after such 30-day period.

(5) Written reports on continuing qualification; designation terminations

(A) Periodic evaluations

(i) In general

The Secretary of Homeland Security, in consultation with the Secretary of State, periodically (but not less than once every 2 years)—

(I) shall evaluate the effect of each program country's continued designation on the law enforcement and security interests of the United States (including the interest in enforcement of the immigration laws of the United States and the existence and effectiveness of its agreements and procedures for extraditing to the United States individuals, including its own nationals, who commit crimes that violate United States law);

(II) shall determine, based upon the evaluation in subclause (I), whether any such designation ought to be continued or terminated under subsection (d) of this section;

(III) shall submit a written report to the Committee on the Judiciary, the Committee on Foreign Affairs, the Permanent Select Committee on Intelligence, and the Committee on Homeland Security, of the House of Representatives and the Committee on the Judiciary, the Committee on Foreign Relations, the Select Committee on Intelligence and the Committee on Homeland Security and Governmental Affairs of the

Senate regarding the continuation or termination of the country's designation that includes an explanation of such determination and the effects described in subclause (I);

(IV) shall submit to Congress a report regarding the implementation of the electronic system for travel authorization system under subsection (h)(3) and the participation of new countries in the program through a waiver under paragraph (8); and

(V) shall submit to the committees described in subclause (III), a report that includes an assessment of the threat to the national security of the United States of the designation of each country designated as a program country, including the compliance of the government of each such country with the requirements under subparagraphs (D) and (F) of paragraph (2), as well as each such government's capacity to comply with such requirements.

(ii) Effective date

A termination of the designation of a country under this subparagraph shall take effect on the date determined by the Secretary of Homeland Security, in consultation with the Secretary of State.

(iii) Redesignation

In the case of a termination under this subparagraph, the Secretary of Homeland Security shall redesignate the country as a pro-

gram country, without regard to subsection (f) of this section or paragraph (2) or (3), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that all causes of the termination have been eliminated.

(B) Emergency termination

(i) In general

In the case of a program country in which an emergency occurs that the Secretary of Homeland Security, in consultation with the Secretary of State, determines threatens the law enforcement or security interests of the United States (including the interest in enforcement of the immigration laws of the United States), the Secretary of Homeland Security shall immediately terminate the designation of the country as a program country.

(ii) Definition

For purposes of clause (i), the term "emergency" means—

(I) the overthrow of a democratically elected government;

(II) war (including undeclared war, civil war, or other military activity) on the territory of the program country;

(III) a severe breakdown in law and order affecting a significant portion of the program country's territory;

(IV) a severe economic collapse in the program country; or

(V) any other extraordinary event in the program country that threatens the law enforcement or security interests of the United States (including the interest in enforcement of the immigration laws of the United States) and where the country's participation in the program could contribute to that threat.

(iii) Redesignation

The Secretary of Homeland Security may redesignate the country as a program country, without regard to subsection (f) of this section or paragraph (2) or (3), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that—

(I) at least 6 months have elapsed since the effective date of the termination;

(II) the emergency that caused the termination has ended; and

(III) the average number of refusals of nonimmigrant visitor visas for nationals of that country during the period of termination under this subparagraph was less than 3.0 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during such period.

(iv) Program suspension authority

The Director of National Intelligence shall immediately inform the Secretary of Homeland Security of any current and credible threat which poses an imminent danger to the United States or its citizens and originates from a country participating in the visa waiver program. Upon receiving such notification, the Secretary, in consultation with the Secretary of State—

(I) may suspend a country from the visa waiver program without prior notice;

(II) shall notify any country suspended under subclause (I) and, to the extent practicable without disclosing sensitive intelligence sources and methods, provide justification for the suspension; and

(III) shall restore the suspended country's participation in the visa waiver program upon a determination that the threat no longer poses an imminent danger to the United States or its citizens.

(C) Treatment of nationals after termination

For purposes of this paragraph—

(i) nationals of a country whose designation is terminated under subparagraph (A) or (B) shall remain eligible for a waiver under subsection (a) of this section until the effective date of such termination; and

(ii) a waiver under this section that is provided to such a national for a period described

in subsection (a)(1) of this section shall not, by such termination, be deemed to have been rescinded or otherwise rendered invalid, if the waiver is granted prior to such termination.

(6) Computation of visa refusal rates

For purposes of determining the eligibility of a country to be designated as a program country, the calculation of visa refusal rates shall not include any visa refusals which incorporate any procedures based on, or are otherwise based on, race, sex, or disability, unless otherwise specifically authorized by law or regulation. No court shall have jurisdiction under this paragraph to review any visa refusal, the denial of admission to the United States of any alien by the Secretary of Homeland Security, the Secretary's computation of the visa refusal rate, or the designation or nondesignation of any country.

(7) Visa waiver information

(A) In general

In refusing the application of nationals of a program country for United States visas, or the applications of nationals of a country seeking entry into the visa waiver program, a consular officer shall not knowingly or intentionally classify the refusal of the visa under a category that is not included in the calculation of the visa refusal rate only so that the percentage of that country's visa refusals is less than the percentage limitation applicable to qualification for participation in the visa waiver program.

(B) Reporting requirement

On May 1 of each year, for each country under consideration for inclusion in the visa waiver program, the Secretary of State shall provide to the appropriate congressional committees—

(i) the total number of nationals of that country that applied for United States visas in that country during the previous calendar year;

(ii) the total number of such nationals who received United States visas during the previous calendar year;

(iii) the total number of such nationals who were refused United States visas during the previous calendar year;

(iv) the total number of such nationals who were refused United States visas during the previous calendar year under each provision of this chapter under which the visas were refused; and

(v) the number of such nationals that were refused under section 1184(b) of this title as a percentage of the visas that were issued to such nationals.

(C) Certification

Not later than May 1 of each year, the United States chief of mission, acting or permanent, to each country under consideration for inclusion in the visa waiver program shall certify to the appropriate congressional committees that the information described in subparagraph (B) is accurate

and provide a copy of that certification to those committees.

(D) Consideration of countries in the visa waiver program

Upon notification to the Secretary of Homeland Security that a country is under consideration for inclusion in the visa waiver program, the Secretary of State shall provide all of the information described in subparagraph (B) to the Secretary of Homeland Security.

(E) Definition

In this paragraph, the term "appropriate congressional committees" means the Committee on the Judiciary and the Committee on Foreign Relations of the Senate and the Committee on the Judiciary and the Committee on International Relations of the House of Representatives.

(8) Nonimmigrant visa refusal rate flexibility

(A) Certification

(i) In general

On the date on which an air exit system is in place that can verify the departure of not less than 97 percent of foreign nationals who exit through airports of the United States and the electronic system for travel authorization required under subsection (h)(3) is fully operational, the Secretary of Homeland Security shall certify to Congress that such air exit system and electronic system for travel authorization are in place.

(ii) Notification to Congress

The Secretary shall notify Congress in writing of the date on which the air exit system under clause (i) fully satisfies the biometric requirements specified in subsection (i).

(iii) Temporary suspension of waiver authority

Notwithstanding any certification made under clause (i), if the Secretary has not notified Congress in accordance with clause (ii) by June 30, 2009, the Secretary's waiver authority under subparagraph (B) shall be suspended beginning on July 1, 2009, until such time as the Secretary makes such notification.

(iv) Rule of construction

Nothing in this paragraph shall be construed as in any way abrogating the reporting requirements under subsection (i)(3).

(B) Waiver

After certification by the Secretary under subparagraph (A), the Secretary, in consultation with the Secretary of State, may waive the application of paragraph (2)(A) for a country if—

(i) the country meets all security requirements of this section;

(ii) the Secretary of Homeland Security determines that the totality of the country's security risk mitigation measures provide assurance that the country's participation in the program would not compromise the law enforcement, security interests, or enforce-

ment of the immigration laws of the United States;

(iii) there has been a sustained reduction in the rate of refusals for nonimmigrant visas for nationals of the country and conditions exist to continue such reduction;

(iv) the country cooperated with the Government of the United States on counterterrorism initiatives, information sharing, and preventing terrorist travel before the date of its designation as a program country, and the Secretary of Homeland Security and the Secretary of State determine that such cooperation will continue; and

(v)(I) the rate of refusals for nonimmigrant visitor visas for nationals of the country during the previous full fiscal year was not more than ten percent; or

(II) the visa overstay rate for the country for the previous full fiscal year does not exceed the maximum visa overstay rate, once such rate is established under subparagraph (C).

(C) Maximum visa overstay rate

(i) Requirement to establish

After certification by the Secretary under subparagraph (A), the Secretary and the Secretary of State jointly shall use information from the air exit system referred to in such subparagraph to establish a maximum visa overstay rate for countries participating in the program pursuant to a waiver under sub-

paragraph (B). The Secretary of Homeland Security shall certify to Congress that such rate would not compromise the law enforcement, security interests, or enforcement of the immigration laws of the United States.

(ii) Visa overstay rate defined

In this paragraph the term "visa overstay rate" means, with respect to a country, the ratio of—

(I) the total number of nationals of that country who were admitted to the United States on the basis of a nonimmigrant visa whose periods of authorized stays ended during a fiscal year but who remained unlawfully in the United States beyond such periods; to

(II) the total number of nationals of that country who were admitted to the United States on the basis of a nonimmigrant visa during that fiscal year.

(iii) Report and publication

The Secretary of Homeland Security shall on the same date submit to Congress and publish in the Federal Register information relating to the maximum visa overstay rate established under clause (i). Not later than 60 days after such date, the Secretary shall issue a final maximum visa overstay rate above which a country may not participate in the program.

(9) Discretionary security-related considerations

In determining whether to waive the application of paragraph (2)(A) for a country, pursuant to paragraph (8), the Secretary of Homeland Security, in consultation with the Secretary of State, shall take into consideration other factors affecting the security of the United States, including—

(A) airport security standards in the country;

(B) whether the country assists in the operation of an effective air marshal program;

(C) the standards of passports and travel documents issued by the country; and

(D) other security-related factors, including the country's cooperation with the United States' initiatives toward combating terrorism and the country's cooperation with the United States intelligence community in sharing information regarding terrorist threats.

(10) Technical assistance

The Secretary of Homeland Security, in consultation with the Secretary of State, shall provide technical assistance to program countries to assist those countries in meeting the requirements under this section. The Secretary of Homeland Security shall ensure that the program office within the Department of Homeland Security is adequately staffed and has resources to be able to provide such technical assistance, in addition to its duties to effectively monitor compliance of the countries participating in the program with all the requirements of the program.

(11) Independent review

(A) In general

Prior to the admission of a new country into the program under this section, and in conjunction with the periodic evaluations required under subsection (c)(5)(A), the Director of National Intelligence shall conduct an independent intelligence assessment of a nominated country and member of the program.

(B) Reporting requirement

The Director shall provide to the Secretary of Homeland Security, the Secretary of State, and the Attorney General the independent intelligence assessment required under subparagraph (A).

(C) Contents

The independent intelligence assessment conducted by the Director shall include—

(i) a review of all current, credible terrorist threats of the subject country;

(ii) an evaluation of the subject country's counterterrorism efforts;

(iii) an evaluation as to the extent of the country's sharing of information beneficial to suppressing terrorist movements, financing, or actions;

(iv) an assessment of the risks associated with including the subject country in the program; and

(v) recommendations to mitigate the risks identified in clause (iv).

(12) Designation of high risk program countries

(A) In general

The Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Secretary of State, shall evaluate program countries on an annual basis based on the criteria described in subparagraph (B) and shall identify any program country, the admission of nationals from which under the visa waiver program under this section, the Secretary determines presents a high risk to the national security of the United States.

(B) Criteria

In evaluating program countries under subparagraph (A), the Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Secretary of State, shall consider the following criteria:

(i) The number of nationals of the country determined to be ineligible to travel to the United States under the program during the previous year.

(ii) The number of nationals of the country who were identified in United States Government databases related to the identities of known or suspected terrorists during the previous year.

(iii) The estimated number of nationals of the country who have traveled to Iraq or Syria

at any time on or after March 1, 2011 to engage in terrorism.

(iv) The capacity of the country to combat passport fraud.

(v) The level of cooperation of the country with the counter-terrorism efforts of the United States.

(vi) The adequacy of the border and immigration control of the country.

(vii) Any other criteria the Secretary of Homeland Security determines to be appropriate.

(C) Suspension of designation

The Secretary of Homeland Security, in consultation with the Secretary of State, may suspend the designation of a program country based on a determination that the country presents a high risk to the national security of the United States under subparagraph (A) until such time as the Secretary determines that the country no longer presents such a risk.

(D) Report

Not later than 60 days after December 18, 2015, and annually thereafter, the Secretary of Homeland Security, in consultation with the Director of National Intelligence and the Secretary of State, shall submit to the Committee on Homeland Security, the Committee on Foreign Affairs, the Permanent Select Committee on Intelligence, and the Committee on the Judiciary of the House of Representatives, and the Committee on Home-

land Security and Governmental Affairs, the Committee on Foreign Relations, the Select Committee on Intelligence, and the Committee on the Judiciary of the Senate a report, which includes an evaluation and threat assessment of each country determined to present a high risk to the national security of the United States under subparagraph (A).

(d) Authority

Notwithstanding any other provision of this section, the Secretary of Homeland Security, in consultation with the Secretary of State, may for any reason (including national security) refrain from waiving the visa requirement in respect to nationals of any country which may otherwise qualify for designation or may, at any time, rescind any waiver or designation previously granted under this section. The Secretary of Homeland Security may not waive any eligibility requirement under this section unless the Secretary notifies, with respect to the House of Representatives, the Committee on Homeland Security, the Committee on the Judiciary, the Committee on Foreign Affairs, and the Committee on Appropriations, and with respect to the Senate, the Committee on Homeland Security and Governmental Affairs, the Committee on the Judiciary, the Committee on Foreign Relations, and the Committee on Appropriations not later than 30 days before the effective date of such waiver.

(e) Carrier agreements

(1) In general

The agreement referred to in subsection (a)(4) is an agreement between a carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title and the Secretary of Homeland Security under which the carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title agrees, in consideration of the waiver of the visa requirement with respect to a nonimmigrant visitor under the program—

(A) to indemnify the United States against any costs for the transportation of the alien from the United States if the visitor is refused admission to the United States or remains in the United States unlawfully after the 90-day period described in subsection (a)(1)(A) of this section,

(B) to submit daily to immigration officers any immigration forms received with respect to nonimmigrant visitors provided a waiver under the program,

(C) to be subject to the imposition of fines resulting from the transporting into the United States of a national of a designated country without a passport pursuant to regulations promulgated by the Secretary of Homeland Security, and

(D) to collect, provide, and share passenger data as required under subsection (h)(1)(B) of this section.

(2) Termination of agreements

The Secretary of Homeland Security may terminate an agreement under paragraph (1) with five days' notice to the carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title for the failure by a carrier (including any carrier conducting operations under part 135 of title 14, Code of Federal Regulations) or a domestic corporation conducting operations under part 91 of that title to meet the terms of such agreement.

(3) Business aircraft requirements

(A) In general

For purposes of this section, a domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations[2] that owns or operates a noncommercial aircraft is a corporation that is organized under the laws of any of the States of the United States or the District of Columbia and is accredited by or a member of a national organization that sets business aviation standards. The Secretary of Homeland Security shall prescribe by regulation the provision of such information as the Secretary of Homeland

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[2] So in Original. Probably should be followed by a comma.

Security deems necessary to identify the domestic corporation, its officers, employees, shareholders, its place of business, and its business activities.

(B) Collections

In addition to any other fee authorized by law, the Secretary of Homeland Security is authorized to charge and collect, on a periodic basis, an amount from each domestic corporation conducting operations under part 91 of title 14, Code of Federal Regulations, for nonimmigrant visa waiver admissions on noncommercial aircraft owned or operated by such domestic corporation equal to the total amount of fees assessed for issuance of nonimmigrant visa waiver arrival/departure forms at land border ports of entry. All fees collected under this paragraph shall be deposited into the Immigration User Fee Account established under section 1356(h) of this title.

(f) Duration and termination of designation

(1) In general

(A) Determination and notification of disqualification rate

Upon determination by the Secretary of Homeland Security that a program country's disqualification rate is 2 percent or more, the Secretary of Homeland Security shall notify the Secretary of State.

(B) Probationary status

If the program country's disqualification rate is greater than 2 percent but less than 3.5 percent, the Secretary of Homeland Security shall place the program country in probationary status for a period not to exceed 2 full fiscal years following the year in which the determination under subparagraph (A) is made.

(C) Termination of designation

Subject to paragraph (3), if the program country's disqualification rate is 3.5 percent or more, the Secretary of Homeland Security shall terminate the country's designation as a program country effective at the beginning of the second fiscal year following the fiscal year in which the determination under subparagraph (A) is made.

(2) Termination of probationary status

(A) In general

If the Secretary of Homeland Security determines at the end of the probationary period described in paragraph (1)(B) that the program country placed in probationary status under such paragraph has failed to develop a machine-readable passport program as required by section[3] (c)(2)(C), or has a disqualification rate of 2 percent or more, the Secretary of Homeland Security shall terminate the designation of the country as a pro-

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[3] So in original. Probably should be "subsection".

gram country. If the Secretary of Homeland Security determines that the program country has developed a machine-readable passport program and has a disqualification rate of less than 2 percent, the Secretary of Homeland Security shall redesignate the country as a program country.

(B) Effective date

A termination of the designation of a country under subparagraph (A) shall take effect on the first day of the first fiscal year following the fiscal year in which the determination under such subparagraph is made. Until such date, nationals of the country shall remain eligible for a waiver under subsection (a) of this section.

(3) Nonapplicability of certain provisions

Paragraph (1)(C) shall not apply unless the total number of nationals of a program country described in paragraph (4)(A) exceeds 100.

(4) "Disqualification rate" defined

For purposes of this subsection, the term "disqualification rate" means the percentage which—

(A) the total number of nationals of the program country who were—

(i) denied admission at the time of arrival or withdrew their application for admission during the most recent fiscal year for which data are available; and

(ii) admitted as nonimmigrant visitors during such fiscal year and who violated the terms of such admission; bears to

(B) the total number of nationals of such country who applied for admission as nonimmigrant visitors during such fiscal year.

(5) Failure to report passport thefts

If the Secretary of Homeland Security and the Secretary of State jointly determine that the program country is not reporting the theft or loss of passports, as required by subsection (c)(2)(D) of this section, the Secretary of Homeland Security shall terminate the designation of the country as a program country.

(6) Failure to share information

(A) In general

If the Secretary of Homeland Security and the Secretary of State jointly determine that the program country is not sharing information, as required by subsection (c)(2)(F), the Secretary of Homeland Security shall terminate the designation of the country as a program country.

(B) Redesignation

In the case of a termination under this paragraph, the Secretary of Homeland Security shall redesignate the country as a program country, without regard to paragraph (2) or (3) of subsection (c) or paragraphs (1) through (4), when the Secretary of Homeland Security, in consultation with the Secretary

of State, determines that the country is sharing information, as required by subsection (c)(2)(F).

(7) Failure to screen

(A) In general

Beginning on the date that is 270 days after December 18, 2015, if the Secretary of Homeland Security and the Secretary of State jointly determine that the program country is not conducting the screening required by subsection (c)(2)(G), the Secretary of Homeland Security shall terminate the designation of the country as a program country.

(B) Redesignation

In the case of a termination under this paragraph, the Secretary of Homeland Security shall redesignate the country as a program country, without regard to paragraph (2) or (3) of subsection (c) or paragraphs (1) through (4), when the Secretary of Homeland Security, in consultation with the Secretary of State, determines that the country is conducting the screening required by subsection (c)(2)(G).

(g) Visa application sole method to dispute denial of waiver based on a ground of inadmissibility

In the case of an alien denied a waiver under the program by reason of a ground of inadmissibility described in section 1182(a) of this title that is discovered at the time of the alien's application for the waiver or through the use of an automated electronic

database required under subsection (a)(9) of this section, the alien may apply for a visa at an appropriate consular office outside the United States. There shall be no other means of administrative or judicial review of such a denial, and no court or person otherwise shall have jurisdiction to consider any claim attacking the validity of such a denial.

(h) Use of information technology systems

(1) Automated entry-exit control system

(A) System

Not later than October 1, 2001, the Secretary of Homeland Security shall develop and implement a fully automated entry and exit control system that will collect a record of arrival and departure for every alien who arrives and departs by sea or air at a port of entry into the United States and is provided a waiver under the program.

(B) Requirements

The system under subparagraph (A) shall satisfy the following requirements:

(i) Data collection by carriers

Not later than October 1, 2001, the records of arrival and departure described in subparagraph (A) shall be based, to the maximum extent practicable, on passenger data collected and electronically transmitted to the automated entry and exit control system by each carrier that has an agreement under subsection (a)(4) of this section.

(ii) Data provision by carriers

Not later than October 1, 2002, no waiver may be provided under this section to an alien arriving by sea or air at a port of entry into the United States on a carrier unless the carrier is electronically transmitting to the automated entry and exit control system passenger data determined by the Secretary of Homeland Security to be sufficient to permit the Secretary of Homeland Security to carry out this paragraph.

(iii) Calculation

The system shall contain sufficient data to permit the Secretary of Homeland Security to calculate, for each program country and each fiscal year, the portion of nationals of that country who are described in subparagraph (A) and for whom no record of departure exists, expressed as a percentage of the total number of such nationals who are so described.

(C) Reporting

(i) Percentage of nationals lacking departure record

As part of the annual report required to be submitted under section 1365a(e)(1) of this title, the Secretary of Homeland Security shall include a section containing the calculation described in subparagraph (B)(iii) for each program country for the

previous fiscal year, together with an analysis of that information.

(ii) System effectiveness

Not later than December 31, 2004, the Secretary of Homeland Security shall submit a written report to the Committee on the Judiciary of the United States House of Representatives and of the Senate containing the following:

(I) The conclusions of the Secretary of Homeland Security regarding the effectiveness of the automated entry and exit control system to be developed and implemented under this paragraph.

(II) The recommendations of the Secretary of Homeland Security regarding the use of the calculation described in subparagraph (B)(iii) as a basis for evaluating whether to terminate or continue the designation of a country as a program country.

The report required by this clause may be combined with the annual report required to be submitted on that date under section 1365a(e)(1) of this title.

(2) Automated data sharing system

(A) System

The Secretary of Homeland Security and the Secretary of State shall develop and implement an automated data sharing system that will permit them to share data in electronic

form from their respective records systems regarding the admissibility of aliens who are nationals of a program country.

(B) Requirements

The system under subparagraph (A) shall satisfy the following requirements:

(i) Supplying information to immigration officers conducting inspections at ports of entry

Not later than October 1, 2002, the system shall enable immigration officers conducting inspections at ports of entry under section 1225 of this title to obtain from the system, with respect to aliens seeking a waiver under the program—

(I) any photograph of the alien that may be contained in the records of the Department of State or the Service; and

(II) information on whether the alien has ever been determined to be ineligible to receive a visa or ineligible to be admitted to the United States.

(ii) Supplying photographs of inadmissible aliens

The system shall permit the Secretary of Homeland Security electronically to obtain any photograph contained in the records of the Secretary of State pertaining to an alien who is a national of a pro-

gram country and has been determined to be ineligible to receive a visa.

(iii) Maintaining records on applications for admission

The system shall maintain, for a minimum of 10 years, information about each application for admission made by an alien seeking a waiver under the program, including the following:

(I) The name or Service identification number of each immigration officer conducting the inspection of the alien at the port of entry.

(II) Any information described in clause (i) that is obtained from the system by any such officer.

(III) The results of the application.

(3) Electronic system for travel authorization

(A) System

The Secretary of Homeland Security, in consultation with the Secretary of State, shall develop and implement a fully automated electronic system for travel authorization (referred to in this paragraph as the "System") to collect such biographical and other information as the Secretary of Homeland Security determines necessary to determine, in advance of travel, the eligibility of, and whether there exists a law enforcement or

security risk in permitting, the[4] alien to travel to the United States.

(B) Fees

(i) In general

No later than 6 months after March 4, 2010, the Secretary of Homeland Security shall establish a fee for the use of the System and begin assessment and collection of that fee. The initial fee shall be the sum of—

(I) $10 per travel authorization; and

(II) an amount that will at least ensure recovery of the full costs of providing and administering the System, as determined by the Secretary.

(ii) Disposition of amounts collected

Amounts collected under clause (i)(I) shall be credited to the Travel Promotion Fund established by subsection (d) of section 2131 of title 22. Amounts collected under clause (i)(II) shall be transferred to the general fund of the Treasury and made available to pay the costs incurred to administer the System.

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[4] So in original. Probably should be "an".

(iii) Sunset of Travel Promotion Fund fee

The Secretary may not collect the fee authorized by clause (i)(I) for fiscal years beginning after September 30, 2020.

(C) Validity

(i) Period

The Secretary of Homeland Security, in consultation with the Secretary of State, shall prescribe regulations that provide for a period, not to exceed three years, during which a determination of eligibility to travel under the program will be valid. Notwithstanding any other provision under this section, the Secretary of Homeland Security may revoke any such determination or shorten the period of eligibility under any such determination at any time and for any reason.

(ii) Limitation

A determination by the Secretary of Homeland Security that an alien is eligible to travel to the United States under the program is not a determination that the alien is admissible to the United States.

(iii) Not a determination of visa eligibility

A determination by the Secretary of Homeland Security that an alien who applied for authorization to travel to the United States through the System is not eligible to travel under the program is not

a determination of eligibility for a visa to travel to the United States and shall not preclude the alien from applying for a visa.

(iv) Judicial review

Notwithstanding any other provision of law, no court shall have jurisdiction to review an eligibility determination under the System.

(D) Fraud detection

The Secretary of Homeland Security shall research opportunities to incorporate into the System technology that will detect and prevent fraud and deception in the System.

(E) Additional and previous countries of citizenship

The Secretary of Homeland Security shall collect from an applicant for admission pursuant to this section information on any additional or previous countries of citizenship of that applicant. The Secretary shall take any information so collected into account when making determinations as to the eligibility of the alien for admission pursuant to this section.

(F) Report on certain limitations on travel

Not later than 30 days after December 18, 2015, and annually thereafter, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the Committee on Homeland Security, the Committee on the Judiciary, and the Committee on Foreign Affairs of the House of Representa-

tives, and the Committee on Homeland Security and Governmental Affairs, the Committee on the Judiciary, and the Committee on Foreign Relations of the Senate a report on the number of individuals who were denied eligibility to travel under the program, or whose eligibility for such travel was revoked during the previous year, and the number of such individuals determined, in accordance with subsection (a)(6), to represent a threat to the national security of the United States, and shall include the country or countries of citizenship of each such individual.

(i) Exit system

(1) In general

Not later than one year after August 3, 2007, the Secretary of Homeland Security shall establish an exit system that records the departure on a flight leaving the United States of every alien participating in the visa waiver program established under this section.

(2) System requirements

The system established under paragraph (1) shall—

(A) match biometric information of the alien against relevant watch lists and immigration information; and

(B) compare such biometric information against manifest information collected by air carriers on passengers departing the United States to confirm such aliens have departed the United States.

(3) Report

Not later than 180 days after August 3, 2007, the Secretary shall submit to Congress a report that describes—

(A) the progress made in developing and deploying the exit system established under this subsection; and

(B) the procedures by which the Secretary shall improve the method of calculating the rates of nonimmigrants who overstay their authorized period of stay in the United States.

8. 8 U.S.C. 1201 (2012 & Supp. III 2015) provides:

Issuance of visas

(a) Immigrants; nonimmigrants

(1) Under the conditions hereinafter prescribed and subject to the limitations prescribed in this chapter or regulations issued thereunder, a consular officer may issue

(A) to an immigrant who has made proper application therefor, an immigrant visa which shall consist of the application provided for in section 1202 of this title, visaed by such consular officer, and shall specify the foreign state, if any, to which the immigrant is charged, the immigrant's particular status under such foreign state, the preference, immediate relative, or special immigrant classification to which the alien is charged, the date on which the validity of the visa shall expire, and such additional information as may be required; and

(B) to a nonimmigrant who has made proper application therefor, a nonimmigrant visa, which shall specify the classification under section 1101(a)(15) of this title of the nonimmigrant, the period during which the nonimmigrant visa shall be valid, and such additional information as may be required.

(2) The Secretary of State shall provide to the Service an electronic version of the visa file of each alien who has been issued a visa to ensure that the data in that visa file is available to immigration inspectors at the United States ports of entry before the arrival of the alien at such a port of entry.

(b) Registration; photographs; waiver of requirement

Each alien who applies for a visa shall be registered in connection with his application, and shall furnish copies of his photograph signed by him for such use as may be by regulations required. The requirements of this subsection may be waived in the discretion of the Secretary of State in the case of any alien who is within that class of nonimmigrants enumerated in sections 1101(a)(15)(A), and 1101(a)(15)(G) of this title, or in the

case of any alien who is granted a diplomatic visa on a diplomatic passport or on the equivalent thereof.

(c) Period of validity; renewal or replacement

(1) Immigrant visas

An immigrant visa shall be valid for such period, not exceeding six months, as shall be by regulations prescribed, except that any visa issued to a child lawfully adopted by a United States citizen and spouse while such citizen is serving abroad in the United States Armed Forces, or is employed abroad by the United States Government, or is temporarily abroad on business, shall be valid until such time, for a period not to exceed three years, as the adoptive citizen parent returns to the United States in due course of his service, employment, or business.

(2) Nonimmigrant visas

A nonimmigrant visa shall be valid for such periods as shall be by regulations prescribed. In prescribing the period of validity of a nonimmigrant visa in the case of nationals of any foreign country who are eligible for such visas, the Secretary of State shall, insofar as practicable, accord to such nationals the same treatment upon a reciprocal basis as such foreign country accords to nationals of the United States who are within a similar class; except that in the case of aliens who are nationals of a foreign country and who either are granted refugee status and firmly resettled in another foreign country or are granted permanent residence and residing in another foreign country, the Secretary of State may prescribe the period of validity of such a visa based upon the treatment granted by that

other foreign country to alien refugees and permanent residents, respectively, in the United States.

(3) Visa replacement

An immigrant visa may be replaced under the original number during the fiscal year in which the original visa was issued for an immigrant who establishes to the satisfaction of the consular officer that the immigrant—

(A) was unable to use the original immigrant visa during the period of its validity because of reasons beyond his control and for which he was not responsible;

(B) is found by a consular officer to be eligible for an immigrant visa; and

(C) pays again the statutory fees for an application and an immigrant visa.

(4) Fee waiver

If an immigrant visa was issued, on or after March 27, 2013, for a child who has been lawfully adopted, or who is coming to the United States to be adopted, by a United States citizen, any statutory immigrant visa fees relating to a renewal or replacement of such visa may be waived or, if already paid, may be refunded upon request, subject to such criteria as the Secretary of State may prescribe, if—

(A) the immigrant child was unable to use the original immigrant visa during the period of its validity as a direct result of extraordinary circumstances, including the denial of an exit permit; and

(B) if such inability was attributable to factors beyond the control of the adopting parent or parents and of the immigrant.

(d) Physical examination

Prior to the issuance of an immigrant visa to any alien, the consular officer shall require such alien to submit to a physical and mental examination in accordance with such regulations as may be prescribed. Prior to the issuance of a nonimmigrant visa to any alien, the consular officer may require such alien to submit to a physical or mental examination, or both, if in his opinion such examination is necessary to ascertain whether such alien is eligible to receive a visa.

(e) Surrender of visa

Each immigrant shall surrender his immigrant visa to the immigration officer at the port of entry, who shall endorse on the visa the date and the port of arrival, the identity of the vessel or other means of transportation by which the immigrant arrived, and such other endorsements as may be by regulations required.

(f) Surrender of documents

Each nonimmigrant shall present or surrender to the immigration officer at the port of entry such documents as may be by regulation required. In the case of an alien crewman not in possession of any individual documents other than a passport and until such time as it becomes practicable to issue individual documents, such alien crewman may be admitted, subject to the provisions of this part, if his name appears in the crew list of the vessel or aircraft on which he arrives and the crew list is visaed by a consular officer, but the consu-

lar officer shall have the right to deny admission to any alien crewman from the crew list visa.

(g) Nonissuance of visas or other documents

No visa or other documentation shall be issued to an alien if (1) it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law, (2) the application fails to comply with the provisions of this chapter, or the regulations issued thereunder, or (3) the consular officer knows or has reason to believe that such alien is ineligible to receive a visa or such other documentation under section 1182 of this title, or any other provision of law: *Provided*, That a visa or other documentation may be issued to an alien who is within the purview of section 1182(a)(4) of this title, if such alien is otherwise entitled to receive a visa or other documentation, upon receipt of notice by the consular officer from the Attorney General of the giving of a bond or undertaking providing indemnity as in the case of aliens admitted under section 1183 of this title: *Provided further*, That a visa may be issued to an alien defined in section 1101(a)(15)(B) or (F) of this title, if such alien is otherwise entitled to receive a visa, upon receipt of a notice by the consular officer from the Attorney General of the giving of a bond with sufficient surety in such sum and containing such conditions as the consular officer shall prescribe, to insure that at the expiration of the time for which such alien has been admitted by the Attorney General, as provided in section 1184(a) of this title, or upon failure to maintain the status under which he was admitted, or to maintain any status sub-

sequently acquired under section 1258 of this title, such alien will depart from the United States.

(h) Nonadmission upon arrival

Nothing in this chapter shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted[1] the United States, if, upon arrival at a port of entry in the United States, he is found to be inadmissible under this chapter, or any other provision of law. The substance of this subsection shall appear upon every visa application.

(i) Revocation of visas or documents

After the issuance of a visa or other documentation to any alien, the consular officer or the Secretary of State may at any time, in his discretion, revoke such visa or other documentation. Notice of such revocation shall be communicated to the Attorney General, and such revocation shall invalidate the visa or other documentation from the date of issuance: *Provided*, That carriers or transportation companies, and masters, commanding officers, agents, owners, charterers, or consignees, shall not be penalized under section 1323(b) of this title for action taken in reliance on such visas or other documentation, unless they received due notice of such revocation prior to the alien's embarkation. There shall be no means of judicial review (including review pursuant to section 2241 of title 28 or any other

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[1] So in original. Probably should be followed by "to".

habeas corpus provision, and sections 1361 and 1651 of such title) of a revocation under this subsection, except in the context of a removal proceeding if such revocation provides the sole ground for removal under section 1227(a)(1)(B) of this title.